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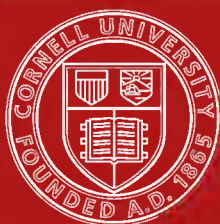
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AN ANALYSIS
OF THE
TORRENS SYSTEM
OF CONVEYING LAND

With References to the Torrens Statutes of Austral-
asia, England, Ireland, Canada and
the United States

*WITH AN APPENDIX CONTAINING THE
ORIGINAL TORRENS ACT*

By WILLIAM C. NIBLACK

OF THE CHICAGO BAR

Author of Mutual Benefit Societies and Accident Insurance, Abstracters and
Title Insurance, The Torrens System, Its Cost
and Complexity, and Etc.

CHICAGO:
CALLAGHAN & COMPANY
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PREFACE.

In 1903, the legislature of Illinois passed an act, with a referendum to the voters, providing for compulsory registration of titles in certain cases. When the question of the adoption of this act was before the voters in Cook County, a bitter controversy arose, and immediately afterward a book entitled "The Torrens System, Its Cost and Complexity," was published by the writer of this treatise. It was merely a brief and argument against that system, and gave little information concerning its principles and the statutes establishing it in different countries. While that book is on a par with most of the controversial writings in this country on the subject of title registration, it should not have been published.

As a stockholder, director and officer of the Chicago Title and Trust Company for the past twenty years, the writer has been interested in the study of the Torrens system. This work is an attempt to analyze its principles, to set out its incidents, to compare the statutory provisions of Torrens acts in different countries, and to set forth and discuss the decisions which have been rendered under those acts. The labor has been done in a spirit of fairness to that great system of conveyancing, and much care has been taken to make correct statements of law and fact. In view of his interests, however, it is proper to subject any conclusions of the writer to any tests known to the reader.

Perhaps any work attempting to analyze the Torrens system should be written by some person known to have no bias for or against the system, but a thorough knowledge of it is now of little practical value to the general practitioner, and neither reputation nor profit can be earned by writing a book which,

in the nature of things, can have but a very limited circulation. It is probable, therefore, that such a book will be written only by some interested person who is fond of recording the results of his investigations.

In this work there is a repetition and reiteration of phrases and ideas. This seems to be necessary for a full understanding of the different phases and technicalities of the subject, when discussed under topical heads.

The numerous references to and quotations from Australian Torrens System, by James Edward Hogg, indicate clearly the writer's appreciation of that thorough treatise.

WM. C. NIBLACK.

Chicago, January, 1912.

CHAPTER I.

Origin and Adoption of the Torrens System.

§ 1. **Land Registration.** For more than two hundred and fifty years the subject of registration of lands has been from time to time before the Parliament of England and has engaged the attention of the public writers of that country. An act was passed in the reign of Queen Elizabeth requiring sales of land to be enrolled in certain counties, but it was loosely drawn and became inoperative. In 1617 another act was passed, but it met with the same fate. In 1649 and 1651 bills were introduced, but were dropped. From that time on various bills were introduced. Some of these were passed by Parliament, but few of them became effective. In England the great objection to registration has been the publicity which it gives to the condition of titles. The registries of the counties of York and Middlesex, established about 1708, are still in existence, but they have never been popular and have never been extended to other counties. All of the earlier bills and acts provided for the copying or abstracting of deeds, but in 1862, "An Act to Facilitate the Proof of Title to and the Conveyance of Real Estate," generally known as Lord Westbury's act, was passed. The object of this act was to register the title to land. It was an utter failure from the start, and afterward the land transfer act, 1875, commonly called Lord Cairn's act, was passed. This law was also for the registration of titles. It had a precarious existence for twenty-two years, when it was modified and supplemented by the land transfer act, 1897.

During all these years land registration was freely discussed in periodicals, pamphlets and books, and there is a

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great amount of literature on the subject. "Reasons against the Bill for County Registers" was written in 1653. "Reasons and Proposals for a Registry or Remembrancer of all Deeds and Incumbrances of Real Estate to be had in every county, most necessary and advantageous, as well for Sellers and Borrowers, as Purchasers and Lenders. To the advance of credit, and the general good, without prejudice to any honest minded Person, most humbly offered to consideration," by Nicholas Philpot, appeared in 1671. In 1694 a posthumous work of Lord Chief Justice Hale was published, entitled, "A treatise shewing how useful, safe, reasonable and beneficial the Enrolling and Registering of all Conveyances of land may be to Inhabitants of this Kingdom." Since that time a great many publications have appeared on the subject of registries and conveyancing, and many acts have been passed by legislative bodies establishing systems of dealing with lands.

§ 2. Four Systems of Dealing With Land. While the laws of civilized countries differ greatly in the methods of dealing with land, it is possible to classify these methods, and to divide them into distinct systems of conveyancing. For many years only three generic systems were used; transfer without recording or registering; the ministerial system of recording or registering deeds; and the judicial system of registering lands. Within the past fifty-four years another system has been adopted in many states and countries, namely, the system of registering titles.

The First System is used in most of the counties of England where land is transferred by the production and delivery of all the title deeds, including one from the seller to the purchaser. This may seem to us a very crude system of dealing with land, but, under the laws, conditions and customs of that country, it has served its purpose so well that the agitation during the past two and one-half centuries for a change from it has not been able to bring about more than a partial abolition of the system. Under the law of primogeniture the eldest son inherits the real estate of a deceased person, and the title papers go with the land. Except for this fact, the system would not be practicable. Until the last fifty years land was scarcely considered a commercial article or commodity in

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England, and the comparative infrequency of transferring land helped to maintain this system. According to an estimate, made in the New Domesday book in 1871, there were only about two hundred thousand landed proprietors in England, and the most of these were opposed to any change which affected lands or their titles. For the year 1909, the ownership of land in England and Wales has been stated as follows: 400 peers and peeresses own 5,729,979 acres; 1288 great land-owners own 8,497,699 acres; 2529 squires own 4,319,271 acres; 9585 greater yeomen own 4,782,627 acres; 24,412 lesser yeomen own 4,144,272 acres, 217,049 small proprietors own 3,931,806 acres; 703,289 cottagers own 151,148 acres, and 14,459 public bodies own 1,443,548 acres. There are 1,524,624 acres of waste land. From this it appears that more than half the area of England and Wales is owned by a few thousand persons. Of the 77,000,000 acres in England and Wales, 40,426,900, or more than one-half, are owned by 2500 persons, and 38,200 persons own three-fourths of the total land area.¹ Under the system which we are considering, a proprietor may borrow money on the security of his land by depositing his title papers with the lender, who thereupon obtains an equitable lien on the land. This method of securing a loan is popular with both borrowers and lenders, since it is cheap, safe and secret. Such a system would not meet the necessities which arise from the laws of our own states, but without a thorough knowledge of the laws, customs and conditions in a foreign country, it is unwise either to condemn or to approve any system of transfer which has been established or has developed in that country.

§ 3. The Second System. The system of transcribing title papers at length on the public records of the county in which the land lies is called the recording system, and it is the one in general use in this country. The recording system is capable of many modifications, and in some form it is in use in France, Scotland, Ireland, Belgium, Italy, Spain, Canada, Australasia, the British dependencies, Russia, Holland, Greece, Egypt, Portugal, the Republics of South and Central America, parts of

¹ England and the English, Price 4,500,000 acres of land in Wales. Collier, p. 107. There are about

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Switzerland, the counties of Middlesex and York in England, and in parts of Asia and Africa. In some of these countries there is established in the different districts an office in which all instruments of title must be recorded in some manner, while in others separate registries are provided for deeds and for mortgages. In many countries title papers are not copied in full, but when an executed instrument is presented to the proper officer, a mere memorandum of it is made on his records. In other countries a memorial is executed in a prescribed form when the instrument is executed, and this memorial is copied in the record. This record is not intended to show the contents or effect of instruments, or to form a repository of secondary evidence of interests in land. Its object is merely to give information of the existence of instruments affecting land, which might be suppressed otherwise, and only such particulars as are necessary to identify the instruments are placed on the record. The law of constructive notice is of course different in the different countries, but in some countries the recording of an instrument is not in itself constructive notice.²

In most states in this country the recording system has been very highly developed. In a general way it may be said that all deeds, mortgages, certified copies of foreign wills and of the probate thereof, and notices of mechanics' liens, affecting real estate in a county, are filed and recorded at length in the recorder's office of the county. Proceedings in court affecting land, and judgments and decrees entered therein, and the probate of estates are found in the records of the proper courts.

² "It is true that a search carelessly made may fail to discover a deed, and that if this be so the purchaser may be in a worse position than if the register had not been searched—for a search in the register fixes the person on whose behalf it is made with notice of all deeds registered in the period searched—whether actually found or not, whether reported to the solicitor or not, whether mentioned by him to his client or not. This rule does not apply to official searches. This risk of constructive notice is sometimes given for a reason for

the omission to search at all, but if proper care be used, or if, under the new rules, an official search be applied for, this danger can be quite avoided." Registration in Middlesex, Brickdale page 3 (1892).

"It has been decided that entry on the register does not operate as notice, but the register is notice if searched." Morris on Land Registration, page 50. This work is "a summary of the law of land and mortgage registration in the British empire and foreign countries," and is an interesting and valuable work

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Taxes and special assessments on lands are spread on the records of the treasurers. The proper records of all these matters are constructive notice of the contents of them to all the world. The record of an instrument does not give to it any validity as affecting the land, but it gives to the world constructive notice of its existence and of any claim which legally may be made under it. The record preserves to the person claiming under the instrument, and to all persons claiming under him, an evidence of an interest in the land affected by it. These records are searched by or on behalf of a person interested in any particular piece of land, and everything pertaining to that land is brought together chronologically, and forms what is called an abstract of title to it. Ordinarily the validity and merchantability of the title shown by the abstract is determined for some interested person by a lawyer whom he employs to examine and report on the title. In some parts of this country this system has been in use for more than one hundred and thirty years.

§ 4. The Third System. The judicial system of registering land is very broad and comprehensive. It embraces such registrations as were made in some continental countries two centuries or more ago. Some of its features are found today in the laws of Russia, Turkey, Germany, Norway, Sweden, Denmark, Mexico, the Republics of Central and South America and other countries. In these countries conveyancing and dealings with land are done under judicial supervision, and are the subject of entries made by courts. The modes of procedure and the effect of these entries differ in the different countries, but the underlying principle of the system is that title vests from the date of the instrument when it has been presented to the court and the proper entries concerning it have been made on the records of the court.

§ 5. The Fourth System. The distinctive feature of the fourth system is that it registers and determines the condition and ownership of the title to land, in lieu of registering instruments as evidence of title. It has developed along certain lines for more than half a century, and is commonly called the Torrens system. Wherever the English language is spoken it has been discussed and considered, and in many places

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it has been adopted. Much has been written in favor of it and against it. No harder things have been said of it than have been said of it in South Australia, where it was first adopted,³ but it has frequently been the subject of violent criticism and of extravagant praise. A careful study of the system will doubtless disclose that it deserves neither the one nor the other, and that, like most legal policies, it has its advantages and its disadvantages. The scheme of the general Torrens system is that the state, through the functions of a registrar, vests and certifies to an indefeasible title to an interest or estate in land. When a title is registered in the first instance, or under a transfer from the last registered owner, the statute declares the certificate to be evidence of an indefeasible title to the interest or estate registered, and the effect of this is that the issue of the certificate, ipso facto, divests any interest or estate which may exist in any other person and vests it in the person registered as owner. There is, therefore, on the part of an intending purchaser, no necessity for a retrospective examination of the title. The registered title is the only title to registered land, though, as we shall presently see, there are some rights and interests in land, which exist off the register, and which must be examined aliunde. Under other systems the efficacy of a deed depends on the validity of the title of the grantor, but under the Torrens system titles are vested by the state, by the act of registration, and a transfer of land does not depend in the least on the validity of the title of the transferor. Subsequent to initial registration, the title to the registered interest or estate may not pass, except by the entry on the register of the name and the interest and estate of the transferee. All mortgages, liens and other matters affecting the title must be noted on the page of the register set apart for that land. This page of the register shows the condition of the title, though instruments filed and not yet recorded must be examined, and inquiry must be made concerning certain rights in the land. As an auxiliary to this scheme of registering indisputable titles, an indemnity fund is created, out of which certain designated classes of persons may be

³ Hogg, Australian Torrens System, p. 22.

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compensated for loss or damage suffered by them through its operations.

§ 6. Fragmentary History of the Torrens System, Australasia. Several treatises have been written on the origin and early development of the Torrens system.⁴ It is not necessary to treat this subject at large in this work, but it may be appropriate to give a brief account of the origin of the system and of its adoption in different places. In the report of a commission appointed in England to inquire into the state of the law of real property, published in 1830, some of the features which were subsequently embodied in the Torrens system were discussed briefly and in a general way. It was suggested that a registry might be established on the same principle as a register of stocks, where title depends on an entry in a book and not on an instrument, that a registry of land should be evidence of title, and not merely evidence of a deed, that a registered proprietor should be the absolute owner, for all marketable purposes, and that there should be a single estate in land instead of two estates, the legal and the equitable. This is the first hint of the scheme of registering titles, of which there is any record in England. But these propositions were first formulated into a law in Australia. Robert R. Torrens, a member of the first colonial ministry of the province of South Australia, introduced in the new parliament a bill providing for the registration of titles, and it became a law in 1858. The method of dealing with titles provided for in this act became known as the Torrens system. Concerning its adoption it has been said: "The boldest effort to grapple with the problem of simplification of title of land was made by Mr. (afterwards Sir Robert) Torrens, a layman, in South Australia, in 1857. When he was a commissioner of customs in that colony he had been struck by the comparative facility with which dealings in regard to transfers of undivided shares of ships were carried out under the system of registration provided in the Merchant Shipping Acts. Subsequently becoming a registrar

⁴ See Hogg, *Australian Torrens System*, pp. 14-36, (1905). Morris on *Land Registration*, London, 1895. Hunter, *Torrens Cases*, Toronto.

Henry Pegram, member N. Y. commission on Torrens System, in paper presented to N. Y. Bar Ass'n January, 1908.

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of deeds, he became acquainted with the confusion and uncertainty inseparable from most questions of title to land. He devised a scheme of registration of title (as opposed to the old schemes of registration of deeds), modelled on the Merchant Shipping Acts, with such modifications as the different nature of the subject-matter demanded. After some opposition his scheme was passed through Parliament as the Real Property Act (No. 15 of 1857-58). Torrens himself carried it into operation, and more than 1,000 titles were registered during the first two years. The prospects of the system were so promising that the other colonies soon followed the example of South Australia. A similar act was passed in Queensland in 1861, in New South Wales, Victoria and Tasmania in 1862, in New Zealand in 1870, in Western Australia in 1874, and in Fiji in 1876⁵. At the second session of the parliament of South Australia sixty of the one hundred and twenty three sections of the act of 1858 were repealed, and were generally replaced by provisions of a similar import. In 1860 an entirely new act was passed. In Australia there have been many amendments to and revisions of the Torrens laws. This changing of these laws has been summarized as follows: "The history of the Australian acts is not favorable to their efficiency or permanence. All of the acts have been amended or entirely repealed several times. There have been in all twelve Victorian acts. The South Australian act of 1886 repealed a number of previous acts, including the original act of 1861, and was followed by three amendatory acts of 1886, 1887, and 1893. In Western Australia, the transfer of land act of 1893 repealed no less than six previous acts. The land transfer act of New Zealand of 1885 also repealed six previous acts, and was itself followed by two other acts, the last in 1889. And finally the Tasmania real property act has, since its passage in 1862, been amended six times—namely, in 1863, 1867, 1878, 1886, 1890 and 1893"⁶. The consolidated real property act, 1900, New South Wales, with the amending act, 1901, is the present law in that state. The act of 1861, as copiously amended in 1877, 1884, 1885, 1886 and 1887 is the present law in the state of Queensland.

⁵ Transfer of Land Act, 1890.

⁶ Reforms in Land Transfer, Duffey and Eagleson, Melbourne, 1895. Olmstead, page 14.

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The act of 1885, with the amendments of 1886, 1888, 1889, and 1902 is the present law in the state of New Zealand. The act of 1886, as amended in 1887 and 1893, is the present law in South Australia. The act of 1862, as amended in 1863, 1867, 1868, 1886, 1890 and 1903, constitutes the present law of Tasmania. The consolidated act, 1890, as amended in 1890 and 1903, constitutes the present law of Victoria. The consolidated act, 1893, which is quite similar to the Victorian act, with the amendments of 1896 and 1902, constitutes the present registration system in Western Australia. The Fiji Ordinance of 1876, with two immaterial amendments of 1883 and 1892, constitutes the present system of registration in that colony. The above acts are now respectively in use in the six states of the Commonwealth of Australia, towit, New South Wales, Victoria, South Australia, Queensland, Tasmania and Western Australia; in the self-governing colony of New Zealand, and in the colony of Fiji.⁷

In each of the states in Australasia some of the land is not under the Torrens system, and in each of the states there are registries of deeds for unregistered land. New South Wales and Tasmania are the oldest states, and there is more unregistered land in them than elsewhere in Australia, because since 1858 all lands from the crown have been put on the Torrens register.

7. Title Registration in England. In 1886, Charles F. Brickdale, now registrar of titles in London, made the following statement concerning title registration in England: "In 1862 the first English registration act, Lord Westbury's, was passed. Under its provisions, any freeholder, or leaseholder for a substantial period, could apply for registration of his title. In 1863, eight titles were registered; in 1864, eight; in 1865, forty-eight; in 1866, one hundred and five; a slow but steady rise in four years, indicating that the land owners and their advisers were not disinclined to give the system a trial, especially when we consider that the scheme was quite new, little known, and imperfectly understood. Nevertheless, the scheme failed. After 1866 the applications fell off; then several titles were removed from the register. In 1870 the number of titles registered in the year only amounted to twenty-nine; in 1875 the

⁷ Hogg, Australian Torrens System.

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total was four. In 1868 a Royal Commission had been appointed to inquire into the causes of the failure, and in accordance with their recommendations another act was drawn up,—the Land Transfer Act, 1875, Lord Cairn's,—whereby it was confidently hoped that the system might be made to work better. How far that hope has been fulfilled, may be judged from the fact that only 113 titles have been registered under it altogether (down to December 23, 1885.) Another coroners jury, in the shape of a select committee of the House of Commons, sat upon this second fatality in 1878-1879. Their verdict was, 'Death from force of circumstances;' and so the matter has been allowed to rest; and though registration of title is admitted on many hands to be the most perfect system in theory, yet many high authorities have nevertheless come to doubt whether it can ever be established in England at all. Many others too, as we have seen, have come to think that, if registration of title is ever to be established, nothing but compulsion will ever establish it. For Ireland an act similar to Lord Westbury's English act was passed in 1865. The success of this act may be estimated from the following circumstance: By the end of 1871 rather less than five hundred titles had been registered, while in 1879 the total seems to have reached only six hundred and eighty-one.'⁸ The act of 1875 was extensively amended in 1897, and the present system of registration in England is conducted under these two acts. They do not apply to Scotland, or Ireland. Concerning registration in England it has been said: "The London Land registry office is located in a building specially erected for its purposes at a cost of \$1,325,000. It has a staff of about 250 officials, whose salaries amount to about \$250,000 annually. In a report made in July 1907, by Robert J. Wynne, United States Consul General at London, it is stated that the expenses of the London Land Registry office, for the year 1904-5, exceeded the receipts by \$55,000; the comparative results for the subsequent years are not given. The system of compulsory registration of titles upon sales has never been extended to any other county in England and Wales. According to reports received, in November and December, 1907, from U. S. Consular officials at Bristol, Leeds, Liverpool, Nottingham and Manchester, the sentiment of landowners, banks, building societies and land companies is generally adverse to any further extension of the compulsory area, while voluntary registration has been practically abandoned. According to a report made by the Registrar on Decem-

⁸ Registration of Title to Land,
pp. 11 & 12.

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ber 31, 1895, to the House of Commons, there were then 4,236 separate titles on the register, comprising 109,000 acres of land valued at about \$70,000,000. These parcels were scattered throughout every county of England and in several counties in Wales. They varied in size, from small lots to estates of several thousand acres; and in value from \$25 to \$1,500,000. Of the total number, 411 had been registered under Lord Westbury's Act of 1862, and the remainder under Lord Cairns' Act of 1875. From the date of the institution of compulsory registration upon sales in the county of London to January 1, 1906, there were 91,284 initial registrations and 109,260 subsequent registered transactions. In the year 1905 these combined registrations averaged 118, daily. Of the initial registrations, three-quarters are leaseholds and one-quarter, only, freeholds. Of the freeholds practically all are registered as possessory titles, this being the simplest and most economical form of registration, as it is issued merely upon the statement of the owner, supported by the production of his deed. In 1904 the applications for registration of absolute titles numbered eighty-five; in 1905, seventy-one; and in 1906, forty-nine. A qualified title is seldom offered for registration, since it involves a statement, upon the land certificate, of the flaw existing in the title."⁹ Forty three absolute titles were registered in 1907, thirty in 1908, and one hundred and one in 1909. Fifty two were registered in the first six months of 1910. The increase since 1908 has been owing to a lowering of the fees for absolute titles and to a system lately introduced of offering absolute title in certain cases where only possessory title is applied for.

Table Showing the Numbers of First Registrations and Dealings in the County of London from 1899 to 1909
(Inclusive).

Year.	First Registrations.	Dealings.	Total.
1899-----	2,955	1,273	4,228
1900-----	11,072	7,144	18,216
1901-----	16,356	13,262	29,618
1902-----	15,904	16,253	32,157

⁹ Pegram, Land Title Registration, pp. 33, 34. At a meeting of the New York State Bar Association in January 1908, Henry Pegram Esq. of the New York Bar, member of the New York State Commission to investigate the Tor-

rens System, presented a paper, entitled "Land Title Registration," giving the development of the system in the different countries. This paper is of great value to anyone who is interested in the history of the Torrens laws

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Year.	First Registrations.	Dealings.	Total.
1903-----	15,262	20,279	35,541
1904-----	13,339	20,875	34,214
1905-----	13,125	23,281	36,406
1906-----	11,124	23,670	34,794
1907-----	10,083	23,865	33,948
1908-----	8,717	23,320	32,037
1909-----	7,159	20,981	28,140
<hr/>			
Totals ----	125,096	194,203	319,299

As between freehold and leasehold properties the numbers so far as available show that the proportion is roughly one freehold to three leaseholds.¹⁰

§ 8. The following is a statement of certain conditions in the registrar's office in London at the present time: "The staff employed on what may be called 'Torrens System' work in the county of London comprises a legal and clerical staff numbering about 30, about 50 typists and copyists, about 60 surveyors and mappists, and about 20 attendants—that is to say about 160 in all. I am obliged to say 'about' because numbers vary from time to time, and some of the staff are partly or wholly employed on country work and on other acts administered by the department, rendering an exact numeration impossible. It must also be remembered that a large part of the work of the 160 just mentioned consists in the bringing of land on to the register-called 'first registration' under the compulsory provisions of Sec. 2 of the Land Transfer Act 1897. As time goes on, and the quantity of unregistered land diminishes, this part of the work diminishes also, but it is balanced by a corresponding increase in the number of dealings with land already registered, which under normal conditions would always be an increasing amount. During the last few years however, owing to the exceptional depression of the land market generally, this increase has not occurred. Almost the whole of the mapping work is 'first registration'. Also, it is probable that if compulsory registration were extended into the Provinces the ordinance survey department would relieve us of much (if not all) our mapping work, so this item would disappear or be greatly reduced. The York and Middlesex offices deal with deed registration only, and have no connection

¹⁰ § 43, Report of Royal Commission on the Transfer of Land Acts, 1911, page 22.

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with the Torrens system.”¹¹ The English act of 1897 provides for making registration of titles compulsory in certain places by order of a certain local authority, and the whole of the county of London, including the city, has been placed under the compulsory order. The order came into operation gradually, and the city was the last portion brought under the operation of compulsory registration. Lands must be brought under the act as they are sold, and no title to any land in that county may pass from the vendor to the purchaser unless and until it has been registered under the act. The land registry office in London registers titles for the whole of England and Wales. Except as to land actually sold in the county of London, registration is voluntary in England and Wales.¹²

§ 9. Ireland. A system of registering deeds has been in force in Ireland for the past two centuries. A system of registering titles was introduced by the act of 1865, but it was a failure. The present system of title registration is conducted under the act for Ireland, 1891.¹³

§ 10. Canada. The revised laws of British Columbia, 1871, contain the first statutes providing for registration of titles to land in the Dominion of Canada. This act was amended at various times. Proceedings under the system are now governed by the act of 1906, as amended in 1907. In 1885, the province of Ontario adopted the system. The laws on the subject have been amended repeatedly. The revised act of 1897, with five amending acts, is the foundation of the present system of registration. It is in force in three counties, Elgin, Ontario, and York, and in seven districts which are not yet organized as counties. The system was adopted in the province of Manitoba in 1885. The revised act of 1902 and four amending acts now constitute the system in that province. In 1886, the first act was passed providing for registration of titles in the Canadian northwest territories. In 1894, another act was passed, which with several amendments, constitutes the system for the present territories. In 1906, the province of Alberta adopted the system, and the districts of North and South Alberta were consolidated. In 1906, the province of Saskatchewan pro-

¹¹ A letter from Sir Charles Fortesque Brickdale, registrar of the land registry, dated October 26, 1910.
¹² Post, § 179.
¹³ Post, § 179.

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vided for the registration of titles and for the consolidation of the districts of Assiniboia and East and West Saskatchewan. When Nova Scotia adopted the system under the act of 1904, it was provided that it should not become operative until the governor in council should proclaim it.¹⁴ In 1907, the requisite proclamation was made, and put it in force in the counties of Annapolis and Colchester. The system has not been adopted in Quebec, Prince Edward Island or New Brunswick, or in the British self-governing colony of New Foundland.

§ 11. British Dependencies. British Honduras, in Central America, passed a land titles act in 1858, nearly two months after the first Torrens act was passed in South Australia. Although it was an original act, its object was to register titles according to the plan of the Torrens system, i. e., to provide for a valid title vested by registration in lieu of conveyances by instruments. The act of 1858 and amending acts were consolidated and re-enacted in 1888 and form the basis of the present system. In that country conditions are primitive, and there are few dealings in real estate.¹⁵ British Guiana, in South America, was given a registration law by the ordinances of 1880. Registration was established in the Leeward Islands in 1886. The present system is conducted under the act of 1906, under which either absolute, qualified or possessory titles may be registered, and by which an assurance fund is provided for. A law for the registration of titles went into effect in Jamaica in 1888, and it has since been extensively amended. Either absolute, qualified or possessory titles may be registered and an assurance fund has been created.¹⁶

§ 12. Torrens Acts in This Country. In 1895, an act for the registration of titles was passed in Illinois, but it was declared unconstitutional by the supreme court on the ground that it conferred judicial powers on the registrar and the examiners of titles.¹⁷ Another act was passed in that state in 1897. This act was amended in 1907, extending the right of access to the

¹⁴ § 9 Nova Scotia act.

¹⁵ Hogg, Australian Torrens System, pp. 20, 809. Pegram, Land Title Registration, pp. 22, 23.

¹⁶ Pegram, Land Title Registra-

tion, pp. 23, 24, 25.

¹⁷ People v. Chase, 165 Ill. 527; 46 N. E. R. 464 (1897). See § 167, post.

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indemnity fund.¹⁸ The act of 1897 provided that registered land on the death of the owner should go to the personal representative of the deceased in like manner as personal estate, and in 1907, it was amended so that registered land descends as unregistered land. This amending act covered several other subjects.¹⁹ In 1903, an amendment passed the legislature of Illinois, with a referendum to the voters of any county which had adopted the Torrens system, providing that every executor and administrator appointed after the adoption of the act, and each trustee holding title or power of sale under wills admitted to probate after that date, within six months after their appointment, should apply for registration of all unregistered lands, situated in any county in which the Torrens system was in force at the time, which the decedent might have registered in his own right in his lifetime. This amendment was adopted by the voters of Cook County, Illinois, at the November election in 1904, but the adoption was declared invalid, because the question of its adoption was not submitted to the voters in the manner prescribed by the act.²⁰ At the November election, 1910, the compulsory act of 1903 was adopted by the voters of Cook County.²¹ The act of 1897, as twice amended in 1907, constitutes the present basis of registration in Illinois.

The California act was passed in 1897. It has not been amended and very few registrations have ever been made under it. The Massachusetts act was passed in 1898. It was amended in 1899, 1900, 1904 and 1905. The jurisdiction of the land court has been greatly extended, and the original act has been somewhat rewritten and revised. The Oregon act was passed in 1901. It was extensively revised in 1905 and 1907. The original act, except in a few sections, was a literal copy of the Illinois act, 1897. The Minnesota act was passed in 1901. In 1903, nine sections of this act were amended, and in 1905 an entirely new act was passed, repealing the act of 1901, as amended in 1903. The Colorado act was passed in 1903. It has not been amended, and little has been done under it. It was taken

¹⁸ Session Laws, Illinois, 1907, p. 207.

¹⁹ Session Laws, Illinois, 1907, p. 208-212.

²⁰ *Harvey v. County of Cook*, 221 Ill. 76; 77 N. E. 424 (1906).

See post, § 180.

²¹ See post § 180.

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very largely from the Minnesota act of 1901. The Washington act was passed in 1907. The Philippine Islands adopted an act in 1902, and the Territory of Hawaii adopted one in 1903. The Philippine and Hawaiian acts differ in only a few particulars, and they are in most respects copies of the Massachusetts act of 1898.

CHAPTER II.

Different Kinds of Registers of Title.

§ 13. **Certificates of Indefeasible Title; Certificates of Absolute, Qualified or Possessory Title.** The central feature of the Torrens system is the governmental register of titles. It is the pivot on which the working of the whole system turns, and it is usually called the certificate of title or land certificate. One object in registering titles under this system is to obtain from the state a certificate which is evidence that the owner of it has title to the estate or interest in land, with which he is registered. In Australasia, in Ireland, in the United States, except in the Territory of Hawaii, and in the Canadian provinces of Manitoba, Alberta and Saskatchewan, the statutes provide that, when the title to an estate or interest in land is registered, it becomes indefeasible and indisputable. Under these acts certificates of indefeasible title only are issued. But under some statutes three kinds of certificates are issued. Under what is called the English scheme of registering titles, an owner may be registered with a certificate of absolute, qualified or possessory title. If he is registered with an absolute title, his certificate is conclusive evidence of an indefeasible title, for registration with an absolute title divests all other persons of any estate in the land and vests in the person so registered the estate or interest in land, described in his certificate, subject only to (1) the incumbrances shown on the certificate, (2) such liabilities, rights and interests as are not covered by registration under the act, (3) and any unregistered trust on which in equity such person may hold the title. Where application is made for registration with an absolute title, and on examination it appears to the registrar that the title can be established only for a limited period, or subject to certain res-

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ervations, the registrar, on the request of the applicant, by an entry on the register, may except from the effect of registration any estate, right or interest arising before a specified date, or arising under a specified instrument or contingency particularly described in the register, and the title registered subject to such excepted estate, right or interest is called a qualified title. Registration with a qualified title has the same effect as registration with an absolute title, save that registration with a qualified title does not affect or prejudice the enforcement of any estate, right or interest appearing by the register to be excepted. Registration of the owner of an estate with possessory title only does not affect or prejudice the enforcement of any estate, right or interest which is adverse to or in derogation of the title registered and which subsists or is capable of arising at the time of such registration; but except in this particular registration with a possessory title has the same effect as registration with an absolute title.¹ When a person is registered with possessory title merely, his certificate is not evidence of the nature and extent of his title at the time of the original registration, but may be disputed and litigated for the enforcement of any right, interest or estate which was adverse to or in derogation of the title when it was registered, or which subsisted or was capable of arising at the time of such registration. On the first registration of a person with a possessory title to an estate or interest in land, he may have in fact an indefeasible title to such estate or interest, but his certificate is not evidence of that fact and does not place his title beyond dispute. The purpose of such registration is merely to place registerable estates or interests in land on the register, and to prevent the subsequent acquirement by any person of rights or interests in them off the register. Since no new rights in registered land may be acquired off the register, it follows that from and after the date of the first registration, the certificate is evidence of an indefeasible title, except as to matters existing or capable of arising before that date.

§ 14. Absolute, Qualified, and Possessory Titles in England. Of course registration with an absolute or qualified title can-

¹ §§6-9 English Land Transfer act, §§ 23, 37-39 Nova Scotia act, act, 1875. §§12-17, 19-24 Ontario §§21, 38 Hawaiian act.

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not be made unless and until the title is examined and approved by the registrar. Such registration is voluntary in England and is only made on application. Perhaps an average of some seventy registrations with absolute title are made each year in England and Wales, and, few registrations with qualified title have ever been made under the act, since such a registration presents in a bold way the defect in the title. The ordinary application is for registration with possessory title only. This is, in part, because the fees for registering an absolute or a qualified title until recently were three times as much as for registering a possessory title, and it is also because of the compulsory feature of registration on sale of property. When registration is compulsory on sale,—as it is in the county of London, where the purchaser of land gets no title unless and until he is registered as the owner—, the title with which the purchaser is registered must not be less than a possessory title. Under this requirement of the statute, it is customary to register the purchaser with a possessory title only.² It is not necessary for an applicant for registration with a possessory title to state definitely the incumbrances, conditions or other burdens which may be on his estate in the land; he need not even state generally that his estate in the land is subject to any such burdens. For such registration his title to the estate is not investigated or examined by the registrar. The apparent owner of the estate is registered with just such title as he may have, and the registration is subject to all outstanding claims and interests. The purpose of such registration is not to declare, establish or confirm the title in the person registered, but is merely to vest in him such title as he may have. As a quit claim deed vests in the grantee such right, title and interest in the land as the grantor may possess, so the registration of a person with possessory title vests in him such an estate as he may then have. He presents to the registrar his deed and such other evidence as the registrar may require, and if he makes out a *prima facie* case, he is thereupon registered as the owner of the estate described in his deed, with possessory title only. Whether the application is voluntary, or compulsory on sale, it should be accompanied by the latest document of title in

² § 20, sub. 3, Act of 1897.

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the possession or under the control of the applicant, to be marked with notice of the registration and with the number of the title, in order to give notice of the fact of registration to any person subsequently dealing with the land.³ In any case, if it is proved that any document of title cannot be produced,—for instance, that it is in the hands of a mortgagee who refuses to produce it,—the registrar may complete the registration of the person without the production of the document.⁴ A transfer for valuable consideration of land registered with a possessory title does not affect or prejudice the enforcement of any right or interest adverse to or in derogation of the title of the first registered owner, and subsisting or capable of arising at the time of the registration of such owner, but, save in this particular, such transfer when registered has the same effect as a transfer for valuable consideration of the same land registered with an absolute title.⁵ In England for several years registration with possessory title was made without entering on the register incumbrances, conditions or other burdens to which the land was subject. Even though the land were leased for 999 years at a low rental and were mortgaged for its full value, and the building on the land belonged to the lessee, the state merely certified that the owner of the fee was registered with possessory title to the land. While this certificate did

³ Land Transfer Rules, 1898, rules 17-21. § 38 English rules, 1908.

⁴ According to Land Transfer Rule 22, 1898, and to rules 2 to 8, 1908, in England, the register consists of three portions or divisions called the proprietorship register, the property register and the charges register. The title to each registered property bears a distinguishing number which is always referred to on each of these registers. The proprietorship register contains the name, address and description of the proprietor, and, giving its number, states whether the title to the land, describing it, is registered as absolute, qualified or possessory. On the face of this register are noted any cautions, inhibitions or restrictions affecting his right to dispose of the property. The property register contains

a description of the land comprised in the title, with a reference to the filed plan of the land, to the number of the title and to the date of registration. The charges register states the number of the title, the date of the registration and memoranda of the incumbrances and burdens adversely affecting the title subsequent to registration. Charges and incumbrances existing at the time of the registration may be noted on it also. But in registering a person with a possessory title, existing incumbrances and other rights need not be entered, unless they are definitely set out in the application, or unless it appears that there is an outstanding leasehold interest which already has been registered. Rules 18 and 54.

⁵ § 32 English act, 1875.

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not prejudice any right, it armed the person who had it with a document which he might make use of to raise money, for in the eyes of the general public such a certificate gave him an appearance of being the owner of the land and building, free of any incumbrance, and gave him an opportunity to impose on uninformed persons, which he would not have had without it.⁶ Such a registration proved in practice to be crude and unscientific, and in 1908 the rule was changed so as to require that all incumbrances, conditions and other burdens on land be noted on a certificate.⁷

§ 15. Concerning Possessory Title. The term “possessory title” is apt to be misunderstood by the legal practitioner in this country, for we are accustomed to use it as descriptive of the statutory title which is acquired by an occupying claimant of land through adverse possession for a length of time fixed by the statute of limitations. When it is used in title registration acts, it merely means the registration of a person who is the apparent owner of the estate with which he is registered; it is a registration, not a certification, of the title. It means that the title to the estate described is registered for what it is worth. By requiring a judicial or quasi-judicial examination and the finding of a satisfactory title, as an indispensable preliminary to admission to the register, a large part of the lands will be kept off the register. Small holdings will not be presented for registration because of the trouble and expense necessarily to be incurred through examination of the titles, and defective titles will be excluded from the register. Registration with possessory title only was formulated and adopted so that any title, however defective or encumbered, may be registered, without certification as to its condition, and so that the value of the registered title, though an unknown quantity, will continue to improve from year to year until at last it will become perfect by operation of the statute of limitations. While such registration does not affect pre-existing outstanding interests, all subsequent interests in and dealings with the land are subject to the operation of the system. A search and examination of the title must be made by a prospective purchaser

⁶ See *Marshall v. Robertson*, 50 7 § 43, *Land Transfer Rules*, 1908, *Solicitors' Journal* 75 (1905).

or dealer, down to the date of such registration, but after that time he may rely on the face of the register, as in other cases of registered land. In England and Ontario, few applications have been made for registration with absolute or qualified titles.

§ 16. Purpose and Effect of Classifying Registered Titles.

Under the general system of registering only such titles as are found to be satisfactory after due examination, many defective titles will be kept from the register. The purpose of the English system of registering a person with absolute, qualified or possessory title is to place on the register the names of the owners of all registerable estates in land situated within the borders of the country, or within a certain district, to prevent the subsequent acquirement of any interest in such estates, except by registering it, and to perfect the evidence of all titles on the register through the effect of the statutes of limitation. Under the general system the dominant idea is that the title itself is declared and registered, while under the English system the dominant idea is that the person is registered with a certain evidence of title. In England, Ontario and Nova Scotia an owner may be registered with an absolute, qualified or possessory title to an estate of freehold or leasehold, and in Hawaii only the owner of an estate in fee simple may be registered with one of the three kinds of evidence of title. Such registration does not indicate the estate or interest with which one is registered, but relates solely to the evidence of title afforded by the certificate. In British Columbia the estate of an applicant may be registered with an absolute or with an indefeasible certificate. This distinction in registration has reference to the quality of the evidence of title. A certificate of an absolute fee in the estate is only *prima facie* evidence of ownership in the registered estate, while a certificate of an indefeasible fee is conclusive evidence of such ownership. The word, "absolute," used to describe a presumptive or *prima facie* title, is rather confusing.

§ 17. When the system of classifying registered titles was first adopted in England and Ontario, it was frequently and confidently declared that in registration with possessory title lay the only hope of ultimate success of the Torrens system.

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But experience has demonstrated the falsity of this prophecy, and today the lack of satisfaction with workings under the acts in England, at least, is attributed to the fact that almost all registrations are with possessory title. It recently has been said: "The land registry has failed so far to make the system of registration of title as smoothworking and as popular as it ought to be, principally because practitioners have taken advantage of the provisions of the act of 1875 to insist on registration with possessory title when the act of 1897 has made registration compulsory. This is really the chief cause of nearly all complaints made against the land transfer acts and the land registry. The essence of any really useful system of registration of title is that the title which passes by a transaction being recorded in a public register should be ipso facto a good title, and should not require extrinsic investigation at the hands of a purchaser. Registration with merely possessory title does not ipso facto enable a purchaser to dispense with investigation of his vendor's title prior to the first registration. It is possessory registration that should be condemned, not the whole system of registration of title as it might be carried out even under the existing land transfer acts. No real trial of the advantages of the acts has yet been made on any adequate scale."⁸ The royal commission on registration of title in Scotland reported in favor of an absolute and indefeasible register of title.⁹

§ 18. Classified Registration in Leasehold Lands. In England a separate register is kept for leasehold lands, in which may be registered leases for a life or lives, or determinable on a life or lives, or for a term of more than twenty one years.¹⁰ The effect of registration of a person with absolute title in leasehold land is to vest in him the right to the possession of all the leasehold estate in the land, as set forth and described therein, with all the implied and expressed rights, privileges and appurtenances attached to such estate, subject (1) to all implied and express covenants, obligations and liabilities incident to such leasehold estate, (2) to any incumbrance entered on the register, (3) to any liabilities, rights and interests which are not covered by registration under the act, (4) and to any equities of a cestui que trust, if the person registered does not

⁸ Vol. 24 Law Quarterly Review, Pages 290 & 291. From a contribution by J. E. Hogg.

⁹ July, 1910, Sir Charles F.

Brickdale, registrar in England, was a member of this commission.

¹⁰ § 11 act of 1875.

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hold the leasehold for his own benefit.¹¹ No person may be registered as owner of leasehold land with absolute title until and unless the title both to the freehold and the leasehold, and to any intermediate leasehold which may exist, is approved by the registrar.¹² The registration of a person as owner of leasehold land with possessory title does not affect or prejudice the enforcement of any estate, right or interest, whether with respect to the lessor's title or otherwise, which is adverse to or in derogation of the title of such registered owner, and which is subsisting or capable of arising at the time of such registration; but except in this particular, it has the same effect as registration with an absolute title.¹³ The rule with respect to the registration of a person with qualified title to leasehold land corresponds exactly with the section of the statute regarding registration with qualified title to freehold land. Where application is made to register a lease on registered land, notice of the application must be given to the registered owner.¹⁴ The registration of a person as first proprietor of leasehold land with a good leasehold title shall not affect or prejudice the enforcement of any estate, right or interest affecting or in derogation of the title of the lessor to grant the lease, but save as aforesaid it shall have the same effect as registration with an absolute title.¹⁵

§ 19. Classified Registration in Hawaii. In Hawaii, the application must state whether an absolute, qualified or possessory title is required.¹⁶ If the court after hearing finds that the applicant has title, as stated in his application, and proper for registration, a decree of confirmation and registration is entered. Every decree of registration with absolute title is conclusive. When a possessory title only is required, the applicant may be registered as the owner of the fee simple on giving such evidence of actual bona possession and of title, and serving such notices, if any, as may be ordered from time to time by the court. The registration of any person as first registered owner of land with a possessory title only, does not affect or prejudice the enforcement of any estate, right or inter-

¹¹ Rule 45 of Land Transfer Rules, 1898 and § 13 of act of 1875.

¹² Rule 53 of 1908.

¹³ Rule 57 of 1908.

¹⁴ Rule 59 of 1908.

¹⁵ Rule 56 of 1908.

¹⁶ § 21 Hawaiian act.

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est adverse to or in derogation of his title, subsisting or capable of arising at the time of his registration; but otherwise the effect is the same as the registration of a person with an absolute title. When an absolute title has been applied for, and on examination it appears to the court that the title can be established only for a limited period or subject to certain reservations, or upon an application claiming such a qualified title, the court, with the consent of the applicant, by an order included in the decree, may except from the effect of registration any estate, right or interest arising before a specified date, or arising under a specified instrument, or otherwise, particularly described in the decree. Such registration is with a qualified title, and has the same effect as registration of such person with an absolute title, save that the enforcement of any estate, right or interest excepted on the register is not affected or prejudiced.¹⁷

¹⁷ § 38 Hawaiian act. See §§37, 38, 39, Nova Scotia act.

CHAPTER III.

What Estates or Interests may be Registered.

§ 20. **What Estates may be Registered in this Country.** In this country fee simple titles only may be registered.¹ In some of the acts it is declared that the owner of any estate or interest in land, whether legal or equitable, may apply to have his title registered, but no provision is made for the initial registration of any lesser estate than a fee simple, and a qualification is immediately added to the effect that no title to a mortgage, lien, trust, charge or estate less than a fee simple shall be registered, unless the title in fee simple is first registered.² In a subsequent sentence in these acts provision is made that any lesser estate than a fee simple shall be noted on the register and in the certificates of title. When the whole matter is figured out, nothing but fee simple titles may be registered in this country, and the lesser estates are noted on the certificates. In all the acts of this country, except in those of Massachusetts, Hawaii and the Philippine Islands, it is provided that it shall not be an objection to bringing land under the act that the title is subject to any outstanding lesser estate, mortgage, trust charge, or other lien or right, but that any such lesser estate, etc. shall be noted on the certificate of registration when issued. In Massachusetts, Hawaii and the Philippine Islands it is provided that if the mortgagee does not consent to the making of the application, it may be entered nevertheless, and the title may be registered subject to the mortgage, which may be

¹ § 4 Minnesota act. § 18 Massachusetts act. § 19 Hawaiian act. § 10 New York act § 19 Philippine act.

² §§ 7 and 8 Illinois act. §§ 5 and 6 Oregon act. §§ 1 and 2 Washington act. §§ 1 and 2 Colorado act. § 5 California act.

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dealt with or foreclosed as if the land had not been registered; that the decree in such case shall describe the mortgage and shall state that it has not been registered and that registration is made subject to it, and that the decree shall provide that no subsequent certificate shall be issued and no further papers shall be registered relative to such land, after a foreclosure of such mortgage.³

In New York, Massachusetts, Hawaii and the Philippine Islands there is no special provision with regard to registering tax titles, but in the other acts in this country it is provided that no tax titles may be registered except under certain conditions therein set forth.⁴ But in British Columbia and Manitoba the registration of tax titles is favored. In those provinces, in case of an application under a tax title, whether that title accrued on registered or on unregistered land, the registrar may not take notice of any irregularity in the tax sale, or in any of the proceedings relating thereto, or in any proceeding prior to or having relation to the assessment of the land, but a certificate from the government, showing the years for which the taxes were due or in arrear, and for which the land was sold, shall be produced, and the registrar shall satisfy himself that the sale was fairly and openly conducted, and shall cause notices to be served on all persons shown by the records to be interested in the land, requiring them to contest the claim of the tax purchaser. When notices cannot be served personally, they may be served by publication.⁵ Where a Torrens act provides that a title derived from a tax sale shall not be registered until it has been adjudicated to be valid by a court of competent jurisdiction, a judgment adjudicating the validity of a tax title, rendered in an action against the holder of the legal title to the property, is a sufficient compliance with the act, even though the judgment does not conclude all persons claiming an interest in the property. Every person not concluded by the judgment may contest the validity of the tax sale in the registration proceeding, and may present for determination therein

³ § 18 Massachusetts act. § 19 Hawaiian act. § 19 Philippine act.

⁴ § 3 Washington act. § 8 Oregon act. § 3 Colorado act. § 10

Illinois act. § 4 Minnesota act. § 9 California act.

⁵ §§ 31-34 British Columbia act. § 46 Manitoba act.

their claims of title adverse to the applicant. If the Torrens act contemplated an adjudication of validity as against all possible claimants, registration proceedings, following a judgment concluding all possible claimants, would be a useless and vain effort, and such a judgment would serve every purpose of a decree in registration. A judgment against the holder of the legal title is sufficient foundation for registration of a tax title.⁶ When an act says that an owner may register his title, he need not be the owner of record, and one holding an unrecorded deed from the conceded owner of the land, may maintain proceedings in registration.⁷ Under the New York act application for registration may be made by the holder of a contract to purchase land, and a decree may be entered on terms consented to by the vendor.⁸

§ 21. What Estates may be Registered in Foreign Countries. Under the English and Ontario acts the owner of freehold or leasehold land may register his title, but in order to entitle a proprietor of leasehold land to registration, he must have a lease for a life or lives, or determinable on a life or lives, or for a term of years of which more than twenty-one years are unexpired.⁹ Where an absolute title to leasehold lands is required, no person may be registered until and unless the title both to the leasehold and the freehold, is examined and approved.¹⁰ The effect of registration of a person as first proprietor of leasehold land with an absolute title is to vest in such person the possession of the land for all the leasehold estate, subject to the express covenants contained in the lease, to such incumbrances as may be entered and to any trusts on which he may hold it.¹¹ No person may be registered as proprietor of leasehold land with good leasehold title until and unless the title to the leasehold interest is approved by the registrar. Registration with a good leasehold title does not affect or prejudice the enforcement of any estate or right affecting or in derogation of the title of the lessor to grant the

⁶ *Hendricks v. Hess*, 112 Minn. 252, 127 N. W. Rep. 995, (1910).

⁷ *National Co. v. Alderson*, 99 Minn. 137, 108 N. W. Rep. 861, (1906)

⁸ § 10 New York act. See § 6 Ontario act.

⁹ § 11 Land Transfer act, 1875. § 19 Ontario act.

¹⁰ § 53 Land Transfer Rules, 1908. § 20 Ontario act.

¹¹ § 55 Land Transfer Rules, 1908.

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lease, but save in this particular it has the same effect as registration with an absolute title.¹² In Ireland a person may be registered as tenant in fee simple, tenant in tail or tenant for life.¹³ In British Columbia, provided the fee simple title has already been registered as absolute or indefeasible, any lesser estate, or mortgage, or lease for more than three years may be registered, if it is satisfactory to the registrar. Such an interest is registered in the "register of charges," and a cross-entry is made in the book of absolute or indefeasible fees, as the case may be. The registered owner of such an interest or charge is deemed to be entitled *prima facie* to the interest, estate or charge set forth on the register and on his certificate.¹⁴ In Nova Scotia a lease for more than three years may be registered, if the fee simple title has been registered. A memorandum of the lease is noted on the register and on the duplicate certificate, and a certificate may be issued to the lessee, if he requires it.¹⁵ In Alberta and Saskatchewan, estates in fee simple only may be registered primarily, but if the fee is registered, a lease for life or lives or for a term of more than three years may be registered, and a certificate of title may be issued to the lessee if he requires it.¹⁶ In Manitoba the owner of any estate or interest in land, whether legal or equitable, may apply to have his interest or the whole title to the land registered, but in his discretion the registrar may refuse to entertain an application unless all persons who are interested in the land consent to the registration.¹⁷ A lease or demise for life or lives or for any term of years may be registered, and a certificate of title for leasehold estate may issue to the lessee.¹⁸ There may be registered under the Victorian act fee simple titles, a title to land claimed in fee simple by prescription, and leasehold interests having at least ten years to run, or determinable with a life or lives.¹⁹ In New South Wales a fee simple title may be registered; and a life estate in

¹² §§ 53, 56 Land Transfer Rules, 1908.

¹³ § 28 Act for Ireland, 1891.

¹⁴ §§ 25-30 British Columbia act.

¹⁵ § 63 Nova Scotia act.

¹⁶ § 26 Alberta act. § 92 Sas-

katchewan act.

¹⁷ § 28 Manitoba act.

¹⁸ § 93 Manitoba act.

¹⁹ § 19, 21, 26, 41 and 110 Victorian act.

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possession of the applicant, or a leasehold for a life or lives, or for a term of years not less than twenty-five, may be registered, provided reversioners and remaindermen join in the application.²⁰ In Tasmania, South Australia and New Zealand, a fee simple estate may be registered and a life estate, not being a leasehold for life or lives, may be registered, provided all persons claiming to be entitled to reversion or remainder join in the application.²¹ In Tasmania a lease having not less than twenty one years unexpired may be registered.²² A fee simple may be registered in Western Australia, and a first estate of freehold may be registered, provided the owner of any vested estate of inheritance joins in the application.²³ In Queensland the owner of a fee simple may register his title, and a tenant for life may bring the land under the act, and on his death the land may not be dealt with by the remainderman until he has brought his estate in the land under the act.²⁴

§ 22. Contiguous Lands: Same Chain of Title. Section 12 of the Illinois act reads: "Any number of contiguous pieces of land in the same county, and owned by the same person, and in the same right, or any number of pieces of property in the same county having the same chain of title and belonging to the same person, may be included in one application." To entitle an owner to include several pieces of land in one application, as authorized by this section, the several pieces must form one compact body, or the several pieces must have the identical chain of title. Lots in different blocks separated by a street, or lots in the same block separated by lots owned by other persons, are not within the meaning of this section, since the word "contiguous" means "touching" or "in actual contact." Lots owned by the same person in different subdivisions do not have the "same" chain of title. within the meaning of this section, when the chain of title is the same from the government down to a certain year, but is then broken, since the word "same" as used in the section, means "identical."²⁵

²⁰ § 14 New South Wales act.

²¹ § 14 Tasmania act. § 27 South Australia act. § 18 New Zealand act.

²² § 8 Tasmania act, (1893).

²³ § 20 Western Australia act.

²⁴ §§ 16, 36-39, 41 Queensland act.

²⁵ Culver v. Waters, 248 Ill. 163, 93 N. E. Rep. 747, (1911).

CHAPTER IV.

Bringing Land Under the Act.

§ 23. **Original Registration in England.** In England and her colonies there are no constitutional limitations on the power of legislative branches of the governments to make laws. In these countries judicial powers may be conferred on administrative officers, and the existing rights and estates in property may be abridged or abolished by statutory declaration. In these countries it is competent for legislatures to confer upon registrars the power to declare and vest titles to land. The power to vest titles in persons registered as owners necessarily includes the power to divest titles from those who are not registered as such. The certification of an indefeasible title to land by a registrar is a simple method of evidencing title, where such a proceeding is valid. In England an application for registration is made to the registrar. He is charged with the duty of passing on the validity of the title, and there is no authority which may interfere with him in the performance of this duty. Questions arising before him on an application for registration,—whether they relate to the construction, validity or affect of an instrument, or to the persons interested, or to the nature or extent of their respective interests, or otherwise—, are determined by him, subject to appeal to the court.¹ If he entertains a doubt as to any matter of law or fact arising upon such title, he may name the parties to a case, and refer it to the court for final decision; and the court may direct any issue of fact to be tried by a jury.² When he registers a per-

¹ Rule 297, Land Transfer Rules, 1908. ² § 74 English act, 1875.

son with absolute title, the certificate is conclusive evidence that the person registered has an indefeasible title to the interest or estate in land so registered, except as to certain matters.³ When he registers a person with qualified title, the certificate is conclusive, save as to the matters, and to the qualifications mentioned in the certificate. In passing on an application for absolute or qualified title, the registrar must make an examination of the title,⁴ and he must fix the number of times on which notice by publication in certain newspapers shall be given, requiring objections to the application, if any, to be made before the expiration of a stated period, not less than two months from the appearance of the latest advertisement.⁵ He may also require notice or summons to be served personally on interested persons, or he may order notice to be sent by mail. Sufficient opportunity must be afforded to all persons to come in and state their objections to applications for registration. The registrar has jurisdiction to hear and determine all such objections, subject to an appeal to the court in the manner and on the conditions prescribed.⁶ When an appeal to court has been taken from the decision of the registrar, or when he has referred a matter to the court, the opinion of the court is conclusive on all parties, unless it permits an appeal.⁷ In registering possessory titles only, no examination of the title is made by the registrar, and no notices are required to be served. The applicant need give only *prima facie* evidence of his title.⁸

§ 24. Registration in Australasia. The Australasian acts are not exactly alike in the provisions regarding initial registration of titles, but they are very similar. If it appears to the registrar that the applicant is the original grantee of Crown land, and that no sale, mortgage or other transaction affecting the title has been registered, the registrar may bring such land under the provisions of the act forthwith. If it appears to the registrar from the report of the examiner of titles that the title

³ Ante § 13.

⁴ § 70 English act, 1875.

⁵ "The cost of these advertisements varies from about 1 l. to about 3 l., according to the amount of advertising required, in fixing which the circumstances of the title and the value of the property are taken into consideration."

Brickdale and Sheldon, Land Transfer acts, p. 342.

⁶ § 298 Land Transfer Rules, 1908. See § 17 English act, 1875. See § 25 Ontario act.

⁷ §§ 74-77 English act, 1875, see also §§ 93, 94 Ontario act.

⁸ § 37 Land Transfer Rules, 1908. See ante § 13.

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of a remote grantee from the Crown is free from any lien or beneficial interest, he causes notice of the application to be advertised in the official gazette and in a daily newspaper for a certain length of time, and appoints a time for hearing, not less than thirty days or more than one year from the time of such advertisement. Unless in the interval he receives a caveat forbidding him to do so, he proceeds to bring the land under the act at such hearing. If it appears to the registrar from the report of the examiner of titles that the title is imperfect, he may reject it, or he may give notice of a time of hearing by publication and by personal notice to all interested persons where possible. He may designate the persons to be notified and the kind of notice to be given, and he may require proof of service. The time set for the hearing must not be less than thirty days or more than one year from the publication of notice. Unless a caveat is filed he may bring the land under the act at the hearing. If the application is contested under a caveat, he must refer the matter to a court having jurisdiction.⁹ The registrar is not a judge of a court. He is clothed with the power and charged with the duty of passing on all questions of law arising in a title submitted to him for registration, and in hearing evidence concerning the title. If any objection to the title is found, he may state a case to the court, and the court will pass on the question of law. Unless a caveat is filed, and the application is contested, the court may not be called on to inquire into and determine questions of fact, and if a caveat is filed and a contest is made, the application must be referred to the court to be tried as a litigated case.¹⁰ Under some acts an appeal may be taken from the decision of the registrar, refusing to register the land. When a registrar refuses to bring land under the act, on the ground that the applicant has not a good title, but that it is in some person not before him, the court, on appeal, will not order the registrar to make the registration, unless it can clearly see that the title is one which would be forced on an unwilling purchaser.¹¹

⁹ §§ 17-23 New South Wales act.
§§ 18-28, Queensland act. §§ 20-30
New Zealand act. §§ 31-40 South
Australia act. §§ 15-24 Tasmania
act. §§ 22-33 Victoria act. §§ 21-

33 Western Australia act.

¹⁰ *In re Stanley*, 24 W. N. (N. S. W.) 74 (1907).

¹¹ *Smith v. Registrar*, 24 N. Z. L. R. 862, (1906).

§ 25. **Australasia, Bringing Land Under the Act.** The land described in the application is formally brought under the Torrens system in Australasia by the issue of a certificate of title to the person entitled to the registered estate.¹² The "bringing of land under the act" is the placing of it on a public register, so that an indefeasible title to estates and interests in it is held by the registered owner and is transferred only by entry on the register.¹³ In Australasia persons are registered with indefeasible titles only.

§ 26. **Registration in Canada.** The Ontario act follows the English act, but it provides that the master of titles may approve of a title presented for registration, or he may require the applicant to apply to court, upon a statement signed by the master, for its sanction to the registration. In investigating a title he may receive and act upon such evidence as is received by courts on questions of title, or any other evidence, not receivable or sufficient in point of strict law, provided it satisfies him of the truth of facts intended to be made out thereby.¹⁴ Registration is made with absolute, qualified or possessory title. In Nova Scotia the master of titles hears and determines all applications for registration. He may refer any application to the registrar for an examination and report, or he may refer it to a special examiner for that purpose. When the report is received, he notifies the applicant that the title is or is not satisfactory. If it is satisfactory, he appoints a time for hearing, notifies the applicant and all persons interested, as shown by the application and examination, and gives notice by publication for thirty days in a newspaper in Halifax and

¹² § 21 New South Wales act. § 37 South Australia act. § 27 Victorian act. § 25 New Zealand act. § 22 Queensland act. § 20 Tasmania act. § 25 Western Australia act.

¹³ "It may be worth while to point out the origin of the expression 'bring land under the act,' or 'under the operation of the act,' which occurs throughout the statutes. The expressions generally used in the English acts are 'place land on the register,' 'registered land,' etc. The South Australian statute, 1857, provided, (§§ 15, 23)

for the publication of formal notice in the Gazette by which a piece of land was declared 'to be land brought under the operation of the said act.' The procedure by Gazette notice has been discontinued, and land is now generally expressed to be 'brought under the act' either by the issue of a certificate of title to the applicant, or by registering a certificate of title in the name of the applicant." Hogg, Australian Torrens System, p. 28.

¹⁴ § 25 Ontario act.

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in one in the county in which the land lies, and by posting a notice on the land.¹⁵ His decree registers the person with absolute, qualified or possessory title as the case may be,¹⁶ and is subject to appeal to the supreme court within three months by any person aggrieved. If no appeal is taken within that time, the title is registered.¹⁷ Every decree of the master of titles is binding and conclusive on all persons, including the crown. Any person claiming to have been deprived of land by fraud may apply to the master of titles within one year from the decree to have it set aside, but such an application does not affect the rights of an innocent purchaser for value.¹⁸ In any case of doubt, the master of titles may apply for directions to the supreme court, or to a judge thereof, and the court or a judge may hear any parties interested in the application.¹⁹ In Manitoba application is made to the registrar. He examines the title papers, records and abstract of title, and if he is satisfied that the title is good and safeholding, he may register it, issue a certificate to the person who appears to be entitled to it, and bring the land under the act. He may give notices to interested persons to appear before him and assert their interests, and he may give hearings on questions of title and claims of interest in the land. He may refuse to entertain any application unless all interested persons other than the applicant consent to the registration.²⁰ In Alberta and Saskatchewan the original registration of a clear and unincumbered title may be made by the registrar, and registration of a title may be made by him subject to any lesser estate, if he entertains no doubt as to the nature or extent of the interest, or on the consent in writing of the person holding the lesser interest; but if he entertains any doubt as to the title or its condition, he must refer the application to a judge for his decision.²¹ The judge examines the title and may hear evidence, and if satisfied with the applicant's title, he orders the registrar to regis-

15 §§ 15, 16 Nova Scotia act.

16 § 23 Nova Scotia act.

17 §§ 25, 26 Nova Scotia act.

18 §§ 27, 28, 29 Nova Scotia act.

19 § 21 B. Nova Scotia act.

20 § 28-45 Manitoba act.

21 §§ 29-35 Alberta act. §§ 62-

65 Saskatchewan act.

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ter it unless the order is appealed from within four weeks.²² In British Columbia, if the registrar is satisfied that the applicant for registration has a good safe-holding and marketable title to the land, he may register it, but if he is not satisfied he may refer it to an examiner of titles. The latter officer may direct that it be registered "in the register of absolute fees,"—the effect of which is that such registered owner *prima facie* has an estate in fee simple, subject to any charges appearing on the register; or he may direct that it be registered "in the register of indefeasible fees," without notice to anyone, or on the giving of some notice prescribed by him,—the effect of which is that the registered owner holds "an estate in fee simple under a good, safe-holding and marketable title," subject to the charges shown on the register; or he may refuse to register it. In case the applicant asks for registration "in the register of absolute fees," the registrar may so register it if he is satisfied with the title, or he may refuse to register it if he is not satisfied with it.²³ A certificate of absolute fee is only *prima facie* evidence of title,²⁴ while a certificate of indefeasible fee is conclusive evidence of title in all courts.²⁵ The registered owner of absolute fee may apply and be registered on the register of indefeasible fees, on the registrar being satisfied that he has a good, safe-holding and marketable title.²⁶ Whenever the registrar refuses to effect a registration on any application, he must notify the applicant of such refusal, and the applicant may petition the court or a judge to hear the petition, and the court or judge shall do so, on such terms as to notices and costs as may seem just and proper.²⁷

§ 27. Illinois act, 1895. In this country every act of a state legislature must be in harmony with the federal and state constitutions, and, in perhaps all of the constitutions, the powers of government are divided into three distinct departments,—the legislative, the executive, and the judicial,—so that no per-

²² § 35 Alberta act. § 69 Saskatchewan act. In Saskatchewan the registers perform their duties under an officer called an inspector of titles, and by an amending act, acts 1908-9, p. 113, contested applications and complicated titles are referred to him instead of to a

judge.

²³ § 15 British Columbia act.

²⁴ § 24 British Columbia act.

²⁵ § 81 British Columbia act.

²⁶ §§ 78 and 79 British Columbia act.

²⁷ § 83 British Columbia act.

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son or collection of persons, being in one of these departments, may exercise any power properly belonging to either of the others. Under such a division of those powers, a registrar of titles, being an executive officer, may not exercise any judicial power to determine, declare or certify to titles. The Illinois act of 1895 provided that the owner of any estate or interest in land, whether legal or equitable, and any person who had the power of appointing or disposing of the entire legal estate in fee simple, might apply to the registrar of the county in which the land was situated to have his title registered. "Upon such application being filed with the registrar, he shall cause examination to be made into the applicant's title to the land and as to the truth of the matter set forth in the application, * * * and shall notify all persons who shall appear, by the application or otherwise, to have any interest in or lien or claim upon the land, of such application, a copy of which notice shall be posted upon the premises, in a conspicuous place, at least ten days before the granting of the certificate of title. * * * It shall be the duty of the examiners to examine, as the basis of their opinion, the full records of all instruments. * * * If it shall be made to appear to the registrar that the facts stated in the application are true, and that the applicant is the owner of the land or interested therein, as set forth in the application, he shall issue a certificate of title and proceed to bring the land under the operation of this act, as hereinafter provided. Otherwise he shall dismiss the application without prejudice. * * * The registered owner of any estate or interest in land brought under this act shall * * * hold the same subject only" to estates and liens noted in the certificate and to the statutory exceptions and burdens.²⁸ Under another section of the act, the registrar could issue a certificate of title only upon the written opinion of two duly appointed examiners of title, "to the effect that the applicant has a good title to the estate or interest in the land, as stated in the application."²⁹ No action adverse to the title, as registered by the registrar, might be commenced after five years from the date of registration.³⁰ The supreme court held the act un-

²⁸ §§ 14, 15 and 29 Illinois act, 1895.

²⁹ § 17 Illinois act, 1895.

³⁰ § 37 Illinois act, 1895.

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constitutional and void because it conferred judicial power upon the registrar and upon his examiners of title, stating that judicial power is the power which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the law; that under any definition of the terms of judicial power it is not necessary that the adjudication between the parties shall be conclusive of their rights put in issue, but if the party or officer is clothed with the power of adjudicating upon and protecting the rights or interests of contesting parties and that adjudication involves the construction and application of the law and affects any of the rights or interests of the parties, though not finally determining the rights, it is still a judicial proceeding and the exercise of judicial functions; that the question is not whether the registrar finally determines the ownership of the land, but whether his decision affects the rights of the parties claiming that ownership; that the decision in a given case that the property shall be brought under the provisions of the act is as fatal to the right of ownership of a contestant as though that question were finally and conclusively settled, except that he still has a limited time in which to have his title settled in a court of law or equity; that if the duties of the registrar are purely ministerial, there is no reason why he should be limited in his right to bring the property within the provisions of the act to cases in which he should have the favorable opinion of at least two examiners; that the act manifestly contemplates that he shall construe and apply the law to the facts presented by the applicant.³¹

In this country the validity of an application to register a title must be established by a court having jurisdiction to ad-

³¹ *People v. Chase*, 165 Ill. 527, 46 N. E. Rep. 454, (1897); see opinion at length at § 167, post. The Illinois act of 1895 was modeled after the Victorian act of 1890, and those sections which treated of the registration of the title by the registrar were in effect identical with it. In speaking of the duties of the registrar under the Victorian act, it has been said: "The intention of the legislature was obviously to impose

the duty upon the registrar to prevent instruments being registered which, in law as well as in fact, ought not to be registered in the first instance, and to determine the validity of the instruments, as well as the priority of registration in point of time. He has therefore to discharge not merely ministerial but judicial duties." *In re, etc., ex parte Bond*, 6 V. L. R. (L) 458, (1880).

judicate on titles and to apply the law. Before we examine the methods and procedure in suits for the initial registration of titles in this country, it may be well to speak of the adaptability of courts for such work.

§ 28. Special Courts. The state constitutions set forth the courts which may be established by the legislatures, and determine the jurisdiction of the several courts when established. Under many of these it is impossible to establish separate courts with special or limited jurisdiction. In Massachusetts, it seems that the legislature has full power to establish a special court for the adjudication and establishment of land titles, for in its Torrens law it provides for a "court of land registration, which shall have exclusive original jurisdiction of all applications for the registration of titles to land within the commonwealth, with power to hear and determine all questions arising upon such applications." In Virginia, where there has been for some time past an agitation in favor of the Torrens system of registration of titles, the recent constitutional convention, under the article on judiciary, adopted this clause: "The legislature shall have power to establish such court or courts of land registration as it may deem proper for the administration of any law it may adopt for the settlement, registration, transfer or assurance of titles to lands in the commonwealth, or any part thereof."

There is much to be said in favor of the creation, in the county where titles are to be registered, of a special court in which to make the initial registration of titles. Its judge is likely to be well versed in real estate law, and to be interested in the technical rules which govern real property. His experience in examining abstracts of title will assist him in his review of the report of the examiner, and make him quick to see the seriousness of any point which may be raised in the title, and ready to suggest some way by which it may be remedied. In devoting his whole time to this special line of work, he will maintain an interest in it and facilitate the work of the court in all its branches. In litigated cases he will become highly proficient in the exercise of his knowledge, and be able to expedite the trial of the issues before him. Courts of general jurisdiction, especially in populous communities, are apt

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to be behind in their calendars and crowded with a great variety of litigation. The hearing of an application for registration must await its turn, and in the rush and push of public cases and cases of magnitude and general interest, the entering of the decree establishing the title according to the finding and report of the examiner is apt to become a mere matter of course and not in any proper sense an adjudication of the court. In this way the constitutional restriction against the exercise of judicial power by a non-judicial officer may practically be nullified, and the decree of the court may become a mere matter of form, except as it gives vitality to the opinion of the examiner. Litigated cases under the Torrens law must take their places on the calendar like other cases, and be heard when they are called. There are often long delays in obtaining final determinations of such cases. It must also be remembered that cases involving the title to real estate, with their voluminous pleadings, long written evidences of title, intricate rules of evidence, nice distinctions and technical rules of construction, are great consumers of time, and greatly tend to impede the rapid progress of such courts. From whatever side it is looked at, it is evident that a court of general jurisdiction is not an ideal tribunal for the initial registration of land titles.

§ 29. Central and Local Courts. Under the Massachusetts act a court of land registration is established for the whole state. Its sittings are in Boston, but it has power to adjourn from time to time to such other places as the public convenience may require. It has two judges who may hold court singly, and different sessions may be held at the same time, either in the same county or in different counties. The clerk of the court is called the recorder, and the register of deeds in each county is an assistant recorder. The salary of the judge of the court is \$4,500 per year, and that of the associate judge is \$4,500 per year. The salaries of the recorder, assistant recorders, examiners of titles and all assistants and messengers are fixed by the governor and council. All the salaries and expenses of the court are paid by the state, except that the salaries of assistant recorders, and all expenses for clerical services incurred by them, are paid by the respective counties. An application for

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registration may be filed with the recorder of the court, or with the assistant recorder in the county where the land lies, and a memorandum is entered and indexed in the books of the county by the assistant recorder. Where an application is filed with the assistant recorder, he transmits the papers to the court in Boston. After an application has been disposed of by the court, a memorandum is sent by the recorder to the assistant in the proper county, who records and indexes it with the records of deeds and in the index of applications. A certified copy of the decree of registration is sent to the assistant recorder of the proper county, and by him transcribed in the registration book. This entry is the original certificate of title, and a duplicate of the entry is the owner's certificate. It is stated³² that where the land is situated in a county distant from Boston, the notices published and served on all the parties in interest state that appearance and answers may be filed with the assistant recorder in the registry of deeds for that county; that if the abstract shows that the petitioner has a clear title and no appearance is entered, the petitioner has no occasion to go to Boston; that all business is conducted by mail; that if evidence is needed to perfect the title, or if an appearance has been entered and a hearing is necessary, especially if there are numerous witnesses to be heard, one of the judges goes to the county where the parties and witnesses are, but that generally the lawyers and parties prefer to go to Boston for the hearing, and that causes may be referred to an examiner of titles as master to hear the evidence and report to the court. It is to be noted also that under several sections of the act³³ application may or must be made to the court in Boston for instructions or relief in very important matters of administration under the act.

We have spoken of the manifest advantages of having the Torrens act administered by a special court, but that court should be local as well as special. One court of registration may possibly satisfy the requirements of small states like

³² Letter of Judge Leonard A. Jones, of the court of registration in Massachusetts, given somewhat at length in "Torrens Acts, Some Comparisons," J. H. Brewster, in

Michigan Law Review, March, 1903.

³³ Notably in §§ 53, 55, 66, 105, 107 and 108.

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Rhode Island and Delaware, but it is certainly a tribute to the enthusiasm of the admirers of the Torrens system in Massachusetts that they should frame such an act, and provide for one central court in Boston to have jurisdiction over the whole commonwealth. The cost in time and money of the initial registration, and the inconvenience of having at a distance the court which administers the act, far outweigh the advantages of a special court, and up to this time no act copying this feature of the Massachusetts act has been passed by any state legislature.³⁴ A bill which is said to be an exact copy of the Massachusetts act, providing for the registration of titles to lands in the District of Columbia, was introduced in the senate of the United States about ten years ago, but it was not passed.³⁵ A special court of the kind provided for in that act would be peculiarly adapted to the District of Columbia, because, on account of the small territory within its jurisdiction, it would be local as well as special.

§ 30. Under the Philippine act there is one court of land registration, which has exclusive jurisdiction of all applications for the registration of title to land, within the Philippine Islands, and of all such other questions as may come before it under the act, subject to the right of appeal from its orders, decisions or decrees to the court of first instance of the city or province where the land lies. Questions of law arising in the court of first instance on trial of the appeal may be taken to the supreme court. When the facts before the court of land registration are not in dispute, that court may enter its findings and decree, and with the consent of the parties, may report them directly to the supreme court for its consideration as a pure question of law. The court of land registration holds its sittings in Manila, but may adjourn from time to time to such other places as the public convenience may require. Two

³⁴ In Ireland the central register is in Dublin. It is the sole register for land situated in the county of Dublin. In each county in Ireland other than Dublin, a local register is established. Tenant-purchasers under the land purchase acts for Ireland must resort to the local officers, but other land owners may choose between the

local and the central office. The rules and methods of procedure of the central and local offices are set forth in a general way in *Land Transfer and Registration of Title in Ireland*. Rt. Hon. Dodgson H. Madden, M. P. Attorney General for Ireland, 1892, page 25 et seq.

³⁵ Senate Bill No. 1911, 57th Congress.

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judges of the court are provided for, and more may be appointed as necessity may require. All applications for registration are filed with the clerk of the court, either directly, or through the register of deeds of the province or city in which the land or some portion of it lies.³⁶ There is a register of deeds in the city of Manila, and one in each province, who, in executing the provisions of the act, are subject to the general direction of the clerk of the court of land registration.³⁷ In Hawaii, the court of land registration has exclusive original jurisdiction of all applications for registration of title to land within the territory, with power to determine all questions arising upon them, and it has jurisdiction over such other questions as may come before it under the act, subject, however, to the right of appeal from its orders, decisions and decrees to the supreme court in certain cases, and subject to the right of appeal to the circuit court if any matter of fact is in issue. All applications for registration are filed with the registrar, who is clerk of the court, either directly, or through the assistant registrar for the district in which the land or a part of it lies. There is one judge of the court of land registration, and its sittings are held in Honolulu. It may adjourn from time to time to such other places as the public convenience may require. All assistant registrars are subject to the general direction of the registrar in executing the provisions of the act.³⁸

§ 31. Registration in Philippine Islands and Hawaii. In the Philippine Islands and Hawaii an application for registration is made to the court of land registration, and by it is referred to an examiner of titles. He examines the records and abstracts of title and investigates the facts set forth in the application or brought to his notice, and makes a report to the court. If, in his opinion, the applicant has a good title, proper for registration, the registrar causes notice of the filing of the application to be published in some newspaper of general circulation. In the Philippines the notice must be published in two newspapers, one in the English and one in the Spanish language. In both jurisdictions a copy of the notice is mailed

³⁶ §§ 2, 14 and 20 Philippine act.
³⁷ § 10 Philippine act.

³⁸ §§ 2, 7, 10 and 14 Hawaiian act.

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by the registrar to each person named in the application, whose address is known, and a copy is posted on each parcel of land described in the application, by a sheriff or his deputy, and his return is conclusive proof of posting. In the Philippines the posted copy of the notice of publication must be in the Spanish language. In both jurisdictions "the court may also cause other or further notice of the application to be given in such manner and to such persons as it may deem proper. The court shall, so far as it deems it possible, require proof of actual notice to all adjoining owners and to all persons who appear to have any interest in or claim to the land included in the application."³⁹ The return of the notice shall not be less than twenty nor more than sixty days from date of issue. Any person claiming an interest may appear and answer. A default is entered against any defendant not appearing, and in case an appearance is entered, the cause is set down for hearing. The court may refer the cause or any part of it, to an examiner of titles, as master, to hear the evidence and to make a report to the court. The court is not bound by the report, but may require further evidence, and may enter a decree according to its findings and judgment. The provisions of the federal constitution with regard to due process of law are not in force in these dependencies,⁴⁰ and there can be no possible question but that the mailing of such notices to known defendants is sufficient service of them: no service of judicial process is necessary. Concerning the provisions of the Philippine act it has been said: "The proceeding for registration is likened to bills in equity to quiet title, but it is different in principle. It is a proceeding in rem under a statute of the type of the Torrens act, such as was discussed in *Tyler v. Registration Ct. Judges*.⁴¹ It is nearer to law than to equity, and is an assertion of legal title; but we think it unnecessary to put it into either pigeon hole."⁴²

³⁹ §§ 30, 31, 32 of both acts. These are taken from §§ 29, 30, 31 of the original Massachusetts act.

⁴⁰ *Hawaii v. Mankichi*, 190 U. S. 197; *Dorr v. United States*, 195 U. S. 138.

⁴¹ 175 Mass. 71, 55 N. E. Rep.

812, 51 L. R. A. 433, (1900).

⁴² *Carino v. Insular Government of Philippine Islands*, 212 U. S. 449, 29 Sup. Ct. Rep. 334, (1909). *Holmes, J.*, appeal from Sup. Ct. Phi. Islands. See §§ 38-41, post.

CHAPTER V.

Original Registration in the United States.

§ 32. Registration in States in this Country. In Illinois the application for registration may be made to any court having chancery jurisdiction in the county where the land is situated,¹ and the application must go either to the circuit or to the superior court, as only they have such jurisdiction in that state. Jurisdiction over such applications is given to the superior court in California and Washington, to the circuit court in Oregon, to the district court in Minnesota and Colorado, to the supreme court in New York. Under the Ohio act, application was to be made to the court of common pleas, or to the probate court, which in that state is one of extensive, if not general, jurisdiction.

Among other things, the fourteenth amendment to the constitution of the United States declares that no state shall deprive any person of property without due process of law. As this constitution is the supreme law of the land, it is binding on every state and court in the Union. A provision that no person shall be deprived of property without due process of law probably is embodied in the constitution of every state. It is only necessary here to say that, among other things, this prohibition means that private rights in property shall not be taken from any person by virtue of the judgment or decree of any court unless reasonable and ample notice has been given, requiring him to come into the court and to defend them.

¹ § 15. The act has a referendum, and has been adopted only by the people of Cook County, in which Chicago is situated.

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After the decision in the Chase case² holding that a registrar of titles could not exercise judicial power and bring land under the operation of the Torrens law, the advocates of that system found that it was necessary in the first instance to register the title under some proceeding in court, analogous to a bill to quiet and establish title. After the great fire in Chicago, October 9, 1871, when all the public records were burned, it was feared that there would be a great difficulty in establishing titles to lands in Cook county, and an act was passed by the state legislature, for the confirmation of titles, commonly known as the "burnt record act." It is an act in personam, provides for such notice to and process on defendants as are usual in chancery practice, and it has been largely used as a means of quieting and establishing titles. The Torrens act of 1897 in Illinois has followed closely the well known practice under that act, and is sufficient for the establishment of the applicant's title after the expiration of the limitation period of two years, provided the proceedings have been properly conducted and the necessary parties have been brought into court as defendants to the application. The following persons are to be made defendants to any application for registration under the Torrens act in Illinois: the occupant, if the land is occupied by any other person than the applicant; the holder of any lien or incumbrance; other persons having any estate or claiming any interest in the land in law or in equity, in possession, remainder, reversion or expectancy.³ All other persons are to be made parties defendant by the name and designation of "All whom it may concern."⁴ Summons is to issue against all persons mentioned as defendants, and it is to be served as in other cases in chancery. Notice is also to be published and mailed to such defendants, in proper cases, substantially as in other cases in chancery, and the court may direct further notice to be given.⁵ Upon a failure to answer, default may be entered and, upon the hearing, a decree may be entered finding in whom the title is vested, and declaring it to be subject to

² *People v. Chase*, 165 Ill. 527, 46 N. E. Rep. 454, 36 L. R. A. 105. See *State v. Gilbert*, 56 Ohio St. 575, 47 N. E. Rep. 551, 60 Am. St. Rep. 756, 38 L. R. A. 519.

³ § 11 of An Act concerning land titles, approved and in force May 1, 1897.

⁴ § 16.

⁵ §§ 19, 20, 21.

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such liens, incumbrances, trusts or interests, if any, as are shown to exist, and directing the registration to be made.⁶ Any person interested, whether named as defendant or not, may appear, answer, file a cross bill and oppose the registration, practically as he may defend in any other chancery proceeding.⁷ In passing on this proceeding, the supreme court said⁸ that the fact that it might be construed as rendering it possible for a judgment to be obtained against a resident of the state of Illinois upon mere constructive notice and without the service of summons on him, did not make the entire act unconstitutional, as a decree might be rendered under the act without the happening of that possibility. But the court held that so much of the act⁹ as provided that "any person having an interest in or lien upon the land, who has not been actually served with process or notified of the filing of such application or the pendency thereof, may, at any time within two years after the entry of such order or decree, and not afterwards, appear" etc., was invalid as an attempt to deprive a person of his vested rights without due process of law.

The acts of Minnesota, Washington and Colorado are very similar to that in Illinois in the requirements which are made for parties defendant and for process against them. The principal difference in the practice seems to be that under the Minnesota, Washington and Colorado acts process is not issued against the defendants until the application has been referred by the court to an examiner of titles for investigation of the title and for inquiry into the truth of the statements made in the application,—particularly as to the occupation of the land—and the report of such examinations has been filed with the clerk. On the filing of the report, process is issued under the order of the court. In its inquiry into the validity of the act of that state, the supreme court of Minnesota held¹⁰ that its provisions for serving the summons and giving notice of the pendency of the proceeding were full and complete, and that they

⁶ §§ 23, 25.

⁷ § 22.

⁸ *People v. Simon*, 176 Ill. 165, page 176, 52 N. E. Rep. 910, 68 Am. St. Rep. 175, 44 L. R. A. 801, (1898).

⁹ Part of § 26.

¹⁰ *State ex rel. Douglas v. Westfall*, 85 Minn. 437, 89 N. W. Rep. 175, 54 Cent. L. J. 282, 89 Am. St. Rep. 571, 57 L. R. A. 297, (1902).

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satisfied both the state and federal constitutions.¹¹

§ 33. The Massachusetts act provided that notice of the application should be served by publication "in some newspaper published in the district where any portion of the lands lie," and by posting it "in a conspicuous place in each parcel of" the land in question, fourteen days at least before the return day, and by mailing a copy "to every person named therein whose address is known" within one week after publication in the newspaper. The posting of the notice was to be performed by a sheriff or his deputy; the publication and mailing by the recorder of the court; and the return of the former and the affidavit of the latter were made "conclusive proof of such service." It was provided that by the description in the notice "to all whom it may concern" "all the world are made parties defendant and shall be concluded by the default and order" which "shall first be entered against all persons who do not appear and answer" on the return day. It was stoutly urged that this act was unconstitutional in that the initial registration deprived all persons, except the registered owner, of any interest in the land without due process of law, but the supreme court held it to be constitutional and valid.¹² In the opinion written by Chief Justice Holmes for the majority of the court, it is said; "I am free to confess, however, that, with the rest of my brethern, I think the act ought to be amended in the direction of still further precautions to secure actual notice before a decree is entered, and that, if it is not amended, the judges of the court ought to do all that is in their power to satisfy themselves that there has been no failure in this regard before they admit a title to registration." After this decision the act was amended, and the court was instructed to "so far as it deems it possible, require proof of actual notice to all adjoining owners and to all persons who appear to have any interest in or claim to the land included in the application. Notice to such persons by mail shall be by registered letter."¹³ In the dissenting opinion in this case, it is said: "The peculiarities

¹¹ In case of personal service, a true copy of the application must be served with the summons. § 15 Colorado act.

¹² Tyler v. Judges of Court of

Registration, 175 Mass. 71, 55 N. E. Rep. 812, 51 L. R. A. 433, (1900).

¹³ § 31 Massachusetts act.

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of this act consist: first, in the fact that it bars or may bar the true owner, by a decree in a proceeding had in his absence, of which he did not in fact have notice, and to which he is not named as a party; second, in the fact that the notice to be given to those who are named therein is inappropriate and inadequate to bring home to them the knowledge of the proceeding and enable them to appear and defend their right; third, in the fact that the return and affidavit of service by the sheriff and recorder cannot be shown to be either false or incorrect; and fourth, in the fact that the decree made in that proceeding, unlike any other judgment or decree known to the law, is final and not subject to be attacked directly or collaterally, even if made in the absence of the true owner and without the true owner having in fact received any notice of the proceeding."

The Ohio act provided that "immediately on the filing of such application (to register the title), the court shall cause the applicant to give notice by publication in some newspaper of general circulation in said county, for the period of four successive weeks, inserted once a week, to all whom it may concern.¹⁴ Immediately on the first publication of said notice, the publisher shall file with the court as many copies of the notice as the court may require for service, and said court shall cause the applicant, or some other competent person, to serve each person named in said application, resident of the county, with a copy of said notice. And persons named in said application, residents without the county, must be served by sending a copy of said notice to their address by mail."¹⁵ In passing upon the sufficiency of the requirements of this act for bringing the interested parties within the jurisdiction of the court, the supreme court of that state said:¹⁶ "To authorize a court to determine the adverse claims of parties touching their right in things, judicial process is indispensable. Judicial process, in its largest sense, comprehends all the acts of the court from the beginning of the proceeding to its end. In a narrower sense it is 'the means of compelling a defendant to appear in court, after suing out the original

¹⁴ §12 Ohio act.

¹⁵ § 14 Ohio act.

¹⁶ State v. Guilbert, 56 Ohio St.

575, 47 N. E. Rep. 551, 60 Am. St. Rep. 756, 38 L. R. A. 519, (1897).

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writ, in civil and after indictment, in criminal cases,' (Bouvier). In every sense it is the act of the court. This act does not contemplate process. The notice which it prescribes is the notice of the law of admiralty. The process required by the law of the land is the process of the common law." The court held that the act was unconstitutional in that it attempted to take private property without due process of law.

§ 34. Under the California act, notice of the time and place of the hearing of the application must be given by four weeks' publication in a designated newspaper, and notice thereof must also be served in the manner prescribed for service of summons in civil actions, either personally or by publication, as the facts require, on all the persons shown by the petition or the abstract of title to be interested in the land. The supreme court construed this provision to mean that personal service must be made, except in those cases wherein under the practice of the state service may be made by publication upon affidavit and an order of the court. The court declared the provision ample and the law constitutional. It said: "The state has full control over the subject of the mode of transferring and establishing titles to property within its limits. For these purposes the state has power to provide a special proceeding, in the nature of a proceeding in rem, to fix the status of the land and declare the nature of the titles and interests therein and the person or persons in whom such titles and interests are at the time vested. It may do this whenever it may be considered necessary or likely to promote the general welfare."¹⁷

In Colorado, the act provides for the reference by the court of the application to an examiner of title, who shall examine the abstract of title, and inquire into the nature of the occupancy of the land. If he reports in favor of the registration of the title, he gives the names of the persons who are to be made defendants in the proceeding. The persons named in the application and in the report of the examiner must be served personally if possible. Those who cannot be found and all unknown claimants to any interest in the lands must be served by publication, as in ordinary actions to quiet titles to real

¹⁷ Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. Rep. 129, (1907).

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estate. The supreme court of that state held that the provisions for notice were reasonable and ample, and that the proceeding for initial registration of titles was constitutional and valid.¹⁸

§ 35. There has been no adjudication on the constitutionality of the Oregon, Washington or New York acts, but there can be no question as to the reasonableness and sufficiency of the notices to interested persons in the proceedings for establishing titles, provided for in them. Indeed, the provisions for suits to declare and confirm titles in all the acts, except the Ohio act and the original Massachusetts act, are clearly within the well-established principles governing bills to quiet title. There are some recent cases¹⁹ upholding the constitutionality of a proceeding to declare and confirm titles, provided for in an act which is far in advance of any Torrens act now on the statute books in this country, and we must examine them carefully for the light which they may throw on judicial proceedings for the original registration of titles.

§ 36. **Confirmation of Title: Due Process of Law.** After the earthquake and fire in San Francisco, in April 1906, the legislature of California was convened to provide for restoring the record title to land in that city, and an act to accomplish that purpose became a law on its approval on June 16, 1906. It is commonly known in that state as the "McEnerny act". It is an act to establish and quiet titles in case of loss or destruction of public records, and provides that, whenever the public records in the office of the recorder are lost or destroyed in whole or in part by flood, fire or earthquake, any interested person may bring and maintain "an action in rem against all the world" to establish his title to lands and to determine all adverse claims thereto. The defendants are described as "all persons claiming any interest in or lien upon the real property herein described, or any part thereof". The summons is directed to "all persons claiming any interest in or

¹⁸ *People v. Crissman*, 41 Colo. 450, 92 Pac. Rep. 949, (1907), citing *State v. Westfall*, 85 Minn. 437. The Colorado act is very similar in its provisions to the Minnesota act.

¹⁹ *Title Co. v. Kerrigan*, 150

Cal. 289, 88 Pac. Rep. 356, 119 Am. St. Rep. 199, 8 L. R. A. (N. S.) 682, (1906). *Hoffman v. Superior Court*, 151 Cal. 386, 90 Pac. Rep. 939, (1907). *American Land Co. v. Zeiss*, 219 U. S. 47, 31 Sup. Ct. Rep. 200, (1911).

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lien upon the real property herein described, or any part thereof" and requires them to appear within three months after the first publication of the notice and set forth their interest in the property described in the summons. At the time of the filing of the complaint the plaintiff must file his affidavit fully and explicitly setting forth and showing, among other things, "that he does not know and has never been informed of any other person who claims or who may claim any interest in or lien upon the property, or any part thereof, adversely to him; or if he does know or has been informed of any such person, then the name and address of such person. If the plaintiff is unable to state one or more of the matters herein required, he shall set forth and show fully and explicitly the reasons for such inability". The summons is required to be published in a newspaper under order of the court or judge thereof, once a week for two months, and each issue is required to give the date of the first publication. If the affidavit discloses the name of any person claiming an adverse interest, summons must be served personally on such person if he is within the state, together with a copy of the complaint and affidavit, and if he resides out of the state, a copy of the summons, complaint and affidavit must be sent to him by mail within fifteen days after the first publication. A copy of the summons must be posted in a conspicuous place on each separate parcel of property within fifteen days after the first publication. At the time of filing his complaint the plaintiff must record in the office of the recorder of the county in which the land lies, a notice of the pendency of the action, setting forth the object thereof and a particular description of the property; and any defendant claiming any affirmative relief must record a similar and appropriate notice. After the completion of these requirements "the court shall have full and complete jurisdiction over the plaintiff and said property and of the person of everyone having or claiming any estate, right, title or interest in and to, or lien upon, said property or any part thereof, and shall be deemed to have obtained the possession and control of such property for the purposes of the action, and shall have full and complete jurisdiction to render the judgment therein which is provided for in this act". No judg-

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ment is given by default, but only on proof of the facts alleged. The judgment when given is to be held to determine all interests in the property, legal, equitable, vested or contingent, and to be conclusive and binding upon every person. The court in passing on the act deemed it unimportant that the person to whom such notice is given is not named in the caption or summons, held that the proceeding was judicial and not administrative and ministerial, and passing over the question as to whether the proceeding was strictly in rem held that the mode of proceeding did not conflict with any special inhibition of the state or federal constitution, was not against natural justice, and was a reasonable method of notice to all the world. On petition for rehearing, the court conceded the unconstitutionality of any law dispensing with personal service on persons who could be identified and served with reasonable diligence, but denied the petition because it was of opinion that when properly framed the affidavit did require a showing as to the diligence used in determining whether or not there were other ascertainable persons claiming an interest in or lien on the property. Several hundred cases under the act were pending in San Francisco, and few of them contained in the record anything more than the averments of the statutory affidavit—, that affiant did not know and had never been informed of any other person who claimed an interest in the property. Many lawyers appeared as “friends of the court”, and on the petition for a rehearing the opinion was withdrawn to await a later decision of the court.²⁰ When this later decision was handed down it held that the positive statement of the plaintiff to the fact, that he did not know and had never been informed of any other person who claimed an adverse interest in the property, was a sufficient mode of procedure, and was a reasonable method of imparting notice to interested persons and to all the world. With regard to the duty of the plaintiff, before he makes the affidavit, to make inquiry, and with regard to the knowledge which would be im-

²⁰ Title Co. v. Kerrigan, 150 Cal. 289, 88 Pac. Rep. 356, 119 Am. St. Rep. 199, 8 L. R. A. (N. S.) 682, (1906). An interest article on this and the following case by

William W. Case, of the Chicago Bar, editor of Chicago Real Estate News, will be found in the number of that publication for February 1909.

puted to him if he should become aware of facts sufficient to put him on inquiry as to the existence of adverse claims, the court said: "These considerations would be of importance, and the neglect to make such inquiry might be of great weight, on the question of the fraud or bad faith of the plaintiff, in any subsequent attack upon the decree upon the ground that there was extraneous fraud of the plaintiff in making a false affidavit to obtain jurisdiction. The affidavit on this point, may be false in fact, and the plaintiff may know it to be false. This, if proven, would go far toward establishing the fraud, upon such subsequent suit. So, in any case, an affidavit to a fact, made to obtain process and secure jurisdiction, may be false, with like effect. The law, however, assumes good faith and does not presume fraud. In any case where constructive service is authorized, it is unnecessary, unless the statute expressly or by implication requires it, that the existence of good faith or the absence of fraud on the part of the plaintiff, in the preliminary steps to acquire jurisdiction of the proceeding, should be affirmatively shown upon the face of the record, either in the affidavit or elsewhere. If fraud or bad faith in this respect was practiced, it does not affect the jurisdiction of the court, nor render the decree invalid on its face."²¹

§ 37. Confirmation of Title; Due Process of Law. A person in possession of certain lots in San Francisco instituted a suit against "all persons claiming any interest in or lien upon the real property herein described, or any part thereof, defendants", to establish his title under the McEnerny act. In his complaint he described the lots, alleged that he was the owner of them, free of incumbrance, and set forth the destruction of the records. At the time of filing his complaint he filed his affidavit setting forth the character of the estate, the source of his title, his possession of the lots, and stating that he had not conveyed the lands; that there were no liens on them, and that he did not know and that he had never been informed of any other person who claimed or might claim any interest or lien upon the property, or any part thereof, adversely to him. The

²¹ *Hoffman v. Superior Court*, (1907).
151 Cal. 386, 90 Pac. Rep. 939.

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affidavit contained no averment that inquiry of any kind had been made to ascertain whether such adverse claim did exist. Summons was published in a newspaper for the space of two months and was posted upon the land, as required by the act. After the expiration of three months from the first publication of the summons he obtained a decree of the court, establishing and confirming his title to the property. After the expiration of more than a year from the date of the entry of the decree, the American Land Company, a corporation of another state, filed a bill in the United States district court at San Francisco, California, to remove the cloud of the above proceeding, and to quiet its title to the lands. The complainant in the bill alleged that it was the owner of the lots, and that it and its grantors long had been the owners of them. The bill set up all the proceedings by the defendant when he brought his suit under the McEnerny act, and alleged that although its grantors, then the owners of the property, at all times during the pendency of such proceedings, were citizens and residents of California, not seeking to evade, but ready to accept the service of summons, and easily reached for that purpose, no service was made on them, and that they did not receive notice of the pendency of the proceeding in any way, and that they did not gain any knowledge of the existence of the decree until more than a year after its entry. A demurrer was interposed to the bill, and was sustained by the district court, which dismissed the bill for want of equity. An appeal was taken to the United States circuit court of appeals for the ninth circuit, which certified the issues involved to the supreme court of the United States to obtain instructions as to whether the McEnerny act was violative of the fourteenth amendment of the federal constitution, and whether by virtue of the decree under that act the American Land Company had been deprived of its property without due process of law. The supreme court held that a state possesses the power to remedy the confusion and uncertainty as to recorded titles to land, arising from the loss or destruction of public records

by flood, fire or earthquake.²² As to the adequacy of the safeguards which the statute provides, the court held that the safeguards afforded to unknown claimants or claims by the provisions of the McEnery act, by an action in rem, to be brought by a person in the actual and peaceable possession of the property against "all persons claiming any interest or lien upon the real property herein described or any part thereof", satisfy the due process of law clause of the federal constitution, where such statute, as construed by the state courts, requires the plaintiff to designate and serve all known claimants, and those whom, with reasonable diligence, he can ascertain to be such, and calls for constructive service by publication against non-residents and unknown owners as well as for the conspicuous posting upon the property of a copy of the summons, and the recording of a *lis pendens*. The court declared that clause of the constitution to be satisfied especially, since the California code of procedure declares that any person interested, and having no actual notice of the decree, may come in at any time within a year after its rendition, and, upon showing cause, may have the decree vacated as to him, and be allowed to answer to the merits.²³

§ 38. Due Process of Law; Action in Rem. In a strict sense, a proceeding in rem is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants, but, in a larger and more general sense, the term is applied to actions between parties, where the direct object is to reach and dispose of property owned by one or more of them. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage or enforce a lien.²⁴ A proceeding to adjudicate and confirm titles to real estate is not included in any of the terms of this description, but it is spoken of as quasi in rem, in rem sub modo, sub-

²² Citing *Clark v. Smith*, 13 Pet. 195, 10 L. Ed. 123; *Barker v. Harvey*, 181 U. S. 481, 45 L. Ed. 963, 21 Sup. Ct. Rep. 690; *Arndt v. Griggs*, 134 U. S. 316, 33 L. Ed. 918, 10 Sup. Ct. Rep. 557; *Hamilton v. Brown*, 161 U. S. 256, 40 L. Ed. 691, 16 Sup. Ct. Rep. 585; *Bertrand v. Taylor*, 87 Ill. 235.

²³ *American Land Co. v. Zeiss*, 219 U. S. 47, 31 Sup. Ct. Rep. 200, (1911).

²⁴ *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. Rep. 557, 33 L. Ed. 918; *Roller v. Holly*, 176 U. S. 398, 44 L. Ed. 520.

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stantially in rem, and in the nature of a proceeding in rem.²⁵ The general welfare of society is involved in the security of titles to real estate, and in the public records of such titles. The power to legislate as to such subjects is inherent in the very nature of government, and the state may exercise the power, whether it seeks to remedy the confusion and uncertainty as to recorded titles, arising from some great calamity and disaster, or whether it merely seeks to provide for and protect individual rights to the soil within its confines.²⁶ The state has control over the lands within its borders, and may create modes of declaring and confirming titles thereto, by providing reasonable and ample methods of imparting to interested persons notice of proceedings brought to affect titles. It is well settled that while the process of a state does not go beyond its borders, it may provide for the judicial determination of the extent and character of the right, title and interest of unknown and non-resident persons, in and to real estate within its limits, by establishing reasonable methods of imparting notice to them. It has been held by state and federal courts that, as against unknown claimants, and resident and non-resident claimants, whose places of residence are unknown, publication in a newspaper of general circulation is a sufficient notice to give courts jurisdiction over them in a suit to quiet and confirm title, when such publication is founded on an appropriate affidavit, and that, on a similar affidavit, such publication of notice is sufficient as against non-residents whose places of residence are known, provided notice of the publication is mailed to them at their last known addresses, or copies of the publication and of the bill are served on them personally by someone who makes proof of the service by proper affidavit. There is no longer any question about the sufficiency of such a notice to such persons in a proceeding to quiet title.

§ 39. However, on the question of the sufficiency of notice of

²⁵ *State v. Westfall*, 85 Minn. 437, 89 N. W. Rep. 175, 54 C. L. J. 282, 89 Am. St. Rep. 571, 57 L. R. A. 297, (1902). *Title Co. v. Kerrigan*, 150 Cal. 289, 88 Pac. Rep. 356, 119 Am. St. Rep. 199, 8 L. R. A. (N. S.) 682, (1907). *Hoff-*

man v. Superior Court, 151 Cal. 386, 90 Pac. Rep. 939, (1907). *Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. Rep. 129, (1907).

²⁶ *American Land Co. v. Zeiss*, 219 U. S. 47, 31 Sup. Ct. Rep. 200, (1911).

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such a proceeding to residents of the state, whose places of residence are known, the state authorities are divided, and the supreme court of the United States has made no precise ruling, under the clause of the federal constitution concerning due process of law against them. The Torrens act of Ohio provided that, immediately on the filing of his application, the court should cause the applicant to give notice by publication in some newspaper of general circulation in the county, for the period of four consecutive weeks, inserted once a week, to all whom it may concern; that the publisher immediately on the first publication should file as many copies of the notice as the court might require for service; that the court should cause the applicant or some other competent person to serve each person named in the application, resident of the county, with a copy of said notice; that persons named in the application, resident without the county, must be served by sending a copy of said notice to their addresses by mail; that affidavit that such service was made at least twenty-one days before the day for hearing should be filed with the court.²⁷ The supreme court of Ohio held that such service on residents of the state was not due process of law. Speaking of the nature of a proceeding to register a title and of the land to be brought under the operation of the Torrens law, it said: "It is not to be sold with a view to the distribution of its proceeds, and it partakes, therefore, less of the nature of a proceeding in rem than does the foreclosure of a mortgage. The land is not a thing of shifting situs like a ship, against which obligations may accrue today in one jurisdiction and tomorrow in another. The status of the land is not changed by registration. The substantial thing determined by registration is that the person who makes the application has a right of property in the land to the exclusion of all other persons. The judicial force of the proceeding is wholly expended in a conclusive determination of the rights of persons in the land." And speaking of the process against residents of the state, required by the act, it said: "To authorize a court to determine the adverse claims of parties touching their rights in things, judicial process is indispensable. Judicial process, in its largest sense, com-

²⁷ §§ 12-14 Ohio act.

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prehends all the acts of the court from the beginning of the proceeding to its end. In a narrower sense it is 'the means of compelling a defendant to appear in court, after suing out the original writ in civil and after indictment in criminal cases'. (Bouvier). In every sense it is the act of the court. This act does not contemplate process. The notice which it prescribes is the notice of the law of admiralty. The process required by the law of the land is the process of the common law."²⁸ The original Massachusetts act required the recorder of the court to publish a notice by order of the court in some newspaper published in the district where any portion of the land might lie. This notice was to be addressed by name to all persons known to have or to claim to have an adverse interest in the land, and to all adjoining owners and occupants so far as known, and "to all whom it may concern". It was to contain a description of the land, the name of the applicant and the time and place of hearing. It was to be posted in a conspicuous place in each parcel of land described in the application, at least fourteen days before the return day, and a copy of it was to be mailed "to every person named therein, whose address is known," within one week after the first publication. The posting of the notice was to be performed by a sheriff or his deputy, and the publication and mailing was to be made by the recorder of the court. The description in the notice, "to all whom it may concern", made all the world parties defendant, and the judgment of the court on the application included every person. It was held that such service of notice satisfied the requirement of due process of law, and Chief Justice Holmes, of the supreme court of Massachusetts, said: "Speaking for myself, I see no reason why what we have said as to proceedings in rem in general should not apply to such proceedings concerning land. * * * But it is said that this is not a proceeding in rem. It is certain that no phrase has been more misused. * * * If the technical object of the suit is to establish a claim against some particular person, with a judgment which generally, in theory at least, binds his body, or to bar some individual claim or objection, so that only certain persons are entitled to be heard in defense, the action is in personam, although it may concern the right to or possession of

²⁸ *State v. Guilbert*, 56 Ohio St. Rep. 756, 38 L. R. A. 519, (1897). 575, 47 N. E. Rep. 551, 60 Am. St.

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a tangible thing. If, on the other hand, the object is to bar indifferently all who might be minded to make an objection of any sort against the right sought to be established, and if any one in the world has a right to be heard on the strength of alleging facts which, if true, show an inconsistent interest, the proceeding is in rem. All proceedings, like all rights, are really against all persons. Whether they are proceedings or rights in rem depends on the number of persons affected. Hence the res need not be personified and made a party defendant, as happens with the ship in the admiralty. * * * But perhaps the classification of the proceeding is not so important as the course of the discussion thus far might seem to imply. I have pursued that course as one which is satisfactory to my own mind, but for the purpose of decision a majority of the court prefer to assume that in cases in which, under the constitutional requirements of due process of law, it heretofore has been necessary to give to parties interested actual notice of the pending proceeding by personal service or its equivalent in order to render a valid judgment against them, it is not in the power of legislature, by changing the form of the proceeding from an action in personam to a suit in rem, to avoid the necessity of giving such a notice, and to assume that under this statute personal rights in property are so involved and may be so affected that effectual notice and an opportunity to be heard should be given to all claimants who are known or who by reasonable effort can be ascertained. It hardly would be denied that the statute takes great precaution to discover outstanding claims, as we already have shown in detail, or that notice by publication is sufficient with regard to claimants outside the state. With regard to claimants living within the state and remaining undiscovered, notice by publication must suffice, of necessity. As to claimants living within the state and known, the question seems to come down to whether we can say that there is a constitutional difference between sending notice of a suit by a messenger and sending it by the post-office, beside publishing in a newspaper, recording in the registry and posting on the land. It must be remembered that there is no constitutional requirement that the summons, even in a personal action, shall be served by an officer, or that a copy served shall be officially attested. Apart from local practice, it may be served by any indifferent person. It may be served on residents by leaving a copy at the last and usual place of abode. When we are considering a proceeding of this kind, it seems to us within the power of the legislature to say that the mail as it is managed in Massachusetts is a sufficient messenger to con-

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vey the notice, when other means of notifying the party, like publishing and posting, also are required. We agree that such an act as this is not to be upheld without anxiety. But the difference in degree between the case at bar and one in which the constitutionality of the act would be unquestionable, seems to us too small to warrant a distinction. If the statute is within the power of the legislature, it is not for us to criticise the wisdom or expediency of what the legislature has done.”²⁹

§ 40. The courts of many states presume that the common law of England is in force in the other states, and many states have declared that the common law of England, so far as it is general and applicable, and substantially as it existed prior to the fourth year of James the First, is in full force unless repealed by legislative authority. One part of the common law, as such, is no more sacred than any other part of it, and, in the absence of constitutional prohibition, a legislature may abolish any part or all of it. A constitutional provision, that the privileges and immunities of a citizen shall not be abridged, must be confined to those privileges and immunities which are fundamental, as belonging of right to the citizens of free governments, and there has never been a suggestion that under such a provision a court may obtain jurisdiction of the property of a citizen only by service on him, by an officer of the court, of the ancient writ of summons, under the hand of its clerk and with the seal of the court. In providing for due process of law, none of the constitutions in this country give a description of the processes which are to be allowed or forbidden, or declares what principles are to be applied to ascertain what is due process. Among other things, the fourteenth amendment to the federal constitution declares: “Nor shall any state deprive any person of life, liberty or property without due process of law.” It has been held that a statute providing for a jury of eight, instead of twelve persons, in any criminal case, not capital, does not deny the right of the defendant to due process of law, if all persons within the state are made liable to be proceeded against in the same way;³⁰ and it is settled that in cases of felony the proceeding by information instead of by indictment by a grand jury, amounts

²⁹ *Tyler v. Judges of Court of Registration*, 175 Mass. 71, 55 N. E. Rep. 812, 51 L. R. A. 433,

(1900).

³⁰ *Maxwell v. Dow*, 176 U. S. 581, 20 Sup. Ct. Rep. 448, (1899).

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to due process of law.³¹ The doctrine on the subject of due process of law in cases of felony seems to be that it is proper for the citizens of each state to determine how persons shall be proceeded against for crimes, and how they shall be tried in criminal cases, provided all persons within the jurisdiction of the state may be proceeded against and tried in the same manner, and provided the equal protection of the law is secured to them. It is easy and natural to extend the same principles of local self-government to civil actions, and, unless the protection of private property is of more consequence than the protection of the life and the liberty of the citizen, we may expect the supreme court of the United States to follow the decision of the supreme court of a state as to the power of the state over titles to real estate within its borders, as to the jurisdiction over the subject, which the state may confer upon its courts, as to the nature of the process of summons to be served on defendants, and as to the adequacy of the safeguards to the rights of interested persons, which the state may provide. Where the supreme court of a state so holds, we may expect the supreme court of the United States to hold that the state may declare actions by occupants of land to quiet and establish titles to be strictly in rem; that in such actions service of the judicial writ of summons is not necessary in order to adjudicate on the rights of persons in land; that a legislature may provide for notice to all persons interested in the land by publication in a newspaper of general circulation in the county, by mailing copies of such publication notices to all interested persons, resident or non-resident within the state, whose addresses are known, as shown by a proper affidavit filed in the cause as a foundation for notice, by posting a copy of such notice on the land, and by filing a notice of *lis pendens* in some appropriate county office. The case of *American Land Co. v. Zeiss*, *supra*, is a long step in this direction. The due process of law clause in the federal constitution restrains only those arbitrary and unreasonable exertions of power, which really are not within lawful state power, as being so unreasonable and unjust as to impair or

³¹ *Hurtado v. California*, 110 U. Rep. 111; *Maxwell v. Dow*, *supra*. S. 516, 28 L. Ed. 232, 4 Sup. Ct.

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destroy fundamental rights. The state is required to make a proceeding to confirm title general and applicable to all persons under like circumstances, to establish a proceeding which is calculated to disclose the names and addresses of all persons interested in the land, and to provide methods which are generally adequate and sufficient to apprise such persons of the steps which are taken against their rights. A state law which possesses these qualities will undoubtedly be sustained. In *American Land Co. v. Zeiss*, *supra*, concerning the requirements for notice, it is said: "We think the statute manifests the careful purpose of the legislature to provide every reasonable safeguard for the protection of the rights of unknown claimants, and to give such notice as, under the circumstances, would be reasonably likely to bring the fact of the pendency and the purpose of the proceeding to the attention of those interested. To argue that the provisions of the statute are repugnant to the due process clause because a case may be conceived where rights in and to property would be adversely affected without notice being actually conveyed by the proceedings, is in effect to deny the power of the state to deal with the subject. The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals."³² In *Twining v. New Jersey*,³³ it was said: "Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, and that there shall be notice and opportunity for hearing given the parties. Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has, up to this time, sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trials, and held them to be consistent with due process of law." The *McEnerney* act, the original Massachusetts act for the registration of titles, and the Ohio act for that purpose, are quite

³² Citing *In Re Empire City Bank*, 18 N. Y. 199; *Title Co. v. Kerrigan*, 150 Cal. 289, 88 Pac. Rep. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199; *Ballard v. Hunter*, 204 U. S. 241, 51 L. Ed.

461, 27 Sup. Ct. Rep. 261; *Huling v. Kaw Valley Co.*, 130 U. S. 559, 32 L. Ed. 1045, 9 Sup. Ct. Rep. 603.
³³ 211 U. S. 78, 53 L. Ed. 97, 29 Sup. Ct. Rep. 14.

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similar in the requirements for jurisdiction over the land described in the proceeding and over the persons interested therein. They are the most progressive acts which have yet been passed in this country for quieting and establishing titles to real estate, and they manifest clearly a tendency to make such a proceeding an action in rem.³⁴

§ 41. Some Minor Observations. The Minnesota, California and Colorado cases on the constitutionality of the Torrens acts were decided by unanimous courts. Mr. Justice Boggs dissented from the opinion of the majority in the Illinois case. The Ohio act was held to be unconstitutional by an unanimous court. As has been pointed out by an able writer,³⁵ "there appear to have been but five of the seven judges of the Massachusetts court sitting in this (the Tyler) case, and the dissent of two as expressed by Justice Loring will not be ignored in future discussions. He agrees with the chief justice neither in his discussion as to whether the proceeding is or is not in rem nor in the conclusion of the majority irrespective of this point. * * * The practical lesson to be learned from these decisions is, it seems, that in acts of this nature there should be the amplest provision made for giving notice to all adverse parties by personal service, wherever this is possible, and by substituted service only when no other is reasonably possible." The Ohio court and a majority of the justices of the Massachusetts court hold that an application to register a title is not a proceeding in rem, while Chief Justice Holmes holds that it is. In the Illinois, Minnesota, California and Colorado Torrens cases there was no occasion to discuss at length the nature of the proceeding, since the acts under consideration in those cases substantially follow the well known practice in chancery and provide for ample personal and substituted service. The California act declares that the decree in the proceeding under it shall be in the nature of a decree in rem, but the service required for jurisdiction over defendants is the same as in civil actions, and the court might have contented itself with

³⁴ See § 1 Massachusetts act. § 2 Hawaiian act. § 2 Philippine act. § 17 California act. State v. Westfall, 85 Minn. 437; Carino v. Insular Government, 212 U. S. 449,

29 Sup. Ct. Rep. 334, (1909).

³⁵ The Torrens Acts, Some Comparisons, by J. H. Brewster, Michigan Law Review, March, 1903, Vol. 1, No. 6.

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so stating. But the language of the opinion and the method of arriving at its conclusion give the impression that the court was quite prepared to hold that such a proceeding could be made strictly in rem.

§ 42. Some Comment on These Cases. In considering the force of these decisions, we must understand exactly what was before the courts for adjudication. In Illinois, Minnesota and Colorado the actions originated upon an information in the nature of a quo warranto against the registrar to show by what authority of law he was exercising the powers and duties of the office of registrar of titles. In each case the defendant, in answer to the information, set up the act of the legislature, commonly known as the Torrens law, and the relator filed a general demurrer. In Massachusetts, a petition was filed, asking for a writ of prohibition to restrain the judges of the court of registration from proceeding to register land in which petitioner claimed an interest, and a demurrer was filed to the petition. In California, plaintiff brought a suit to compel defendant, as judge of the superior court, to make an order appointing a time for hearing a petition for registration, as provided for in the act of March 7, 1897. Defendant refused to proceed under the act on the ground that it was unconstitutional and void. In each case it was argued that the Torrens act providing for the registration of titles was unconstitutional and void. It is clear that the question to be determined was whether the Torrens act so violated the constitution as to render it void, and therefore to furnish no justification for the exercise of powers and duties under it; and it is equally clear that in the determination of that question every reasonable doubt should be resolved in favor of the validity of the act. Under the issues presented, it was not competent for the court to give a construction to the different sections of the act, which did not involve the validity of the entire law. Constitutional guaranties for the protection of persons or property can be invoked generally only by persons whose rights are injuriously affected by the alleged disregard of such guaranties, and the construction of provisions not affecting the validity of an entire act will usually be left until the necessity for construction shall arise in cases involving rights under them. It has been stated

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that the Torrens act in Massachusetts has been held to be constitutional both in the supreme court of that state, and in the supreme court of the United States, but the latter court declined to take jurisdiction of the case when it was brought before it. The disposition of the case was published in December, 1900, as follows: "The constitutionality of the Massachusetts land registration act was involved in the case of William B. Tyler against the court of registration, coming from the supreme court of Massachusetts. But in deciding the case Justice Brown held that Tyler did not have the status requisite to challenge the constitutionality of the law, and that the court could not decide moot questions or abstract propositions presented by a party who did not himself disclose that he would be affected. The court holds that it cannot assume to decide the general question whether Massachusetts has established a court whose jurisdiction may as to some other person than the party in the suit amount to a deprivation. The decision adds that it will be only after the party had shown that a right has been denied him under the XIVth amendment that he may have a writ of error from this court. A dissenting opinion was delivered by the Chief Justice and was concurred in by Justices Harlan, Brewer and Shiras."³⁶

§ 43. None of the cases involving the constitutionality of our present Torrens acts really considers the distinctive principles or elementary processes of the system. They all consider the method of establishing a title under the respective acts for the purpose of registering it, and they hold that the acts provide for notice to all persons interested in the land, which is reasonable and sufficient to give jurisdiction over such persons, in order to confirm and establish the title in question and to decree registration of it. These decisions are manifestly right on this point, and a study of sections 12, 13 and 14 of the repealed Ohio act, in connection with the recent cases on the subject of actions in rem to establish title to land, may leave much doubt as to the correctness of the decision on this point by the supreme court of Ohio in the Guilbert case. When the court decided in each of these cases that the pro-

³⁶ Tyler v. Judges of Court of Sup. Ct. Rep. 206, (1900).
Registration, 179 U. S. 405, 21

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ceeding for placing the title on the register was valid and sufficient, it seemed to be taken for granted that the constitutionality of the act was established in the state where the decision was rendered. In *People v. Chase*, *supra*, it was held that a title could not be placed on an indefeasible register by a registrar, according to the scheme of the Torrens system, and these cases merely held that a title could be placed on such a register by a decree of court obtained by process under the acts, according to the principles of the judicial system of registering titles. While they did not determine the legality of a single principle of the Torrens system, they held that the substitute for the first Torrens registration by act of the registrar answered every constitutional requirement for due process of law. *People v. Chase*, *supra*, at once recognized the principle of the Torrens system, that a certificate of title becomes absolute and conclusive evidence of title, declared that such a certificate became conclusive, if at all, only by an adjudication by the registrar on the rights of all persons concerned, and held that a registrar under the constitution, could not exercise judicial functions and issue a certificate which would directly or ultimately conclude the rights of such persons. All Torrens statutes declare that every certificate shall be conclusive evidence of title, and no distinction is made between the first certificate and subsequent ones. In *People v. Chase*, *supra*, the power of the registrar to make an original registration was challenged and was directly passed on; and in the Torrens cases which we have been considering in this chapter the power of the registrar to make a new registration on the transfer of registered land was challenged, but the question was not met squarely along the whole line of attack. Without explaining or attempting to explain the difference between the nature of the functions of the registrar in making the first registration and in making a subsequent registration on a transfer of registered land, both of which are declared by statute to be conclusive, they held that his acts in making a new registration are merely ministerial and quasi judicial. Having held that his acts concluded no one and might be corrected by any proper proceeding for that purpose, they made no attempt to explain how the statutory declaration operates,

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which says that the certificate issued by the registrar shall be conclusive evidence of title in all courts and in all places. This statutory declaration of an indefeasible title on the register is the very essence, center and heart of the system. In foreign jurisdictions it is made effective by the fact that the registrar acts judicially in making any registration, first or subsequent, and that he adjudicates on the rights of all persons interested in it, and applies the law to their rights, whether they are present or absent, and whether or not they have been notified and given an opportunity to be heard. When instruments of transfer are filed in his office, and are thus presented to him for registration, he is empowered by statute to register them on his own judgment as to their legal effect, without notice to anyone, and when he makes a registration, whether it is right or wrong, the state vests the title by the statutory declaration of indefeasibility of a registered title.³⁷ This is the scheme of the Torrens system, and while we have decisions upholding generally the Torrens acts which have been passed in some of the states in this country, we have no decision which holds that such a scheme may be operated in this country.

§ 44. Other Constitutional interpretations. An act was entitled "an act for the certification of land titles and the simplification of the transfer of real estate". Provisions of the act related to felonies, county officers, county government, principal and surety, lawyers, judgments, liens, procedure and other matters connected with land titles and the transfer of land. The claim was made that the act violated the provision of the constitution, that "every act shall embrace but one subject, which subject shall be expressed in its title". The court said: "We think the title to the act sufficiently expresses the subject to which it relates, and that it embraces but one general subject. We find no sufficient ground for holding the law unconstitutional."³⁸ In Colorado the act is entitled "an act concerning land titles," and the court held that the title to the act is not so general as to be repugnant to the constitutional requirement, that the subject of an act

³⁷ See post § 147.

³⁸ Robinson v. Kerrigan, 151

Cal. 40, 90 Pac. Rep. 129, (1907).

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shall be clearly expressed.³⁹ In one case it was said: "It is claimed that the act is special because it makes special provisions regarding the statute of limitations, the rights of purchasers in good faith of land registered under the act, and other matters peculiar to the lands which are brought within its provisions. We perceive no merit in this contention. The fact that the land thus registered may be conveyed and transferred by means different from that required as to other lands, and the necessity of a special proceeding as a foundation for the system, creates a separate class of such registered lands, and authorizes special provisions of law on the subject, applying only to such registered lands, the owners thereof, or persons interested therein, or to the procedure whereby the system is to be inaugurated."⁴⁰ The Torrens acts in Illinois and Minnesota are held to be general and not special laws.⁴¹

The fact that the act gives affirmative relief to the applicant for registration only,—by providing for a decree in his favor if his title is sustained and merely for the dismissal of the action if it is not sustained—, is not contrary to a constitutional provision that all persons must be given equal rights and privileges under the law. The right to a particular remedy is not a vested right, and every state has complete control over the remedies which it offers to suitors in its courts. The object of the proceeding under the act is not to give affirmative relief to defendants, but to establish, declare and make conclusive the status or right of the applicant as a foundation for subsequent transfers and dealings with the land.⁴² A provision of the act that an examiner of titles may act as referee and report his findings to the court is not repugnant to the constitution as a delegation of judicial power, when the court is also given power to inquire into the facts and into his findings.⁴³ A provision to the effect that the reg-

³⁹ *People v. Crissman*, 41 Colo. 450, 92 Pac. Rep. 949, (1907).

⁴⁰ *Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. Rep. 129, (1907). See *Lofstad v. Murasky*, 152 Cal. 64, 91 Pac. Rep. 1008, (1907). *Waugh v. Glos*, 246 Ill. 604, 92 N. E. Rep. 974, (1909).

⁴¹ *People v. Simon*, 176 Ill. 165,

52 N. E. Rep. 910, 68 Am. St. Rep. 175, 44 L. R. A. 801, (1898); *State v. Westfall*, 85 Minn. 437, 89 N. W. Rep. 175, 57 L. R. A. 297, 89 Am. St. Rep. 571, 54 Cent. L. J. 282, (1902).

⁴² *People v. Crissman*, *supra*, citing *Cooley's Const. Lim.* 515.

⁴³ *State v. Westfall*, *supra*.

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istrar of titles shall perform his duties under the act under rules and instructions established and given by the court which is administering the act, is not unconstitutional. It does not devolve executive duties on the court; it simply confers on it certain judicial duties incident to the plan of registering titles under the act.⁴⁴ When a recorder of deeds or other officer is made a registrar of titles under an act for the registration of titles, he is not elected or appointed a new county officer within the meaning of constitutional provisions concerning such election or appointment. His duties as recorder or other officer are merely added to and extended.⁴⁵ A provision that the act shall not take effect until after a favorable vote by a county is not a delegation of legislative power.⁴⁶ The fact that an act providing that an examiner of titles may receive in evidence any abstract of title or certified copy thereof, made in the ordinary course of business by makers of abstracts, makes such abstract evidence without the sanction of an oath, does not render the act unconstitutional.⁴⁷ Where an original act was not in force until it was adopted by a vote of the citizens of a county, and the legislature afterward amended the act without providing for the submission of the amendment to the vote of the people, it was held that the amendment was not unconstitutional.⁴⁸

⁴⁴ *Tyler v. Judges*, 175 Mass. 71, 55 N. E. Rep. 812, 51 L. R. A. 433, (1900); *State v. Westfall*, *supra*; *People v. Crissman*, *supra*.

⁴⁵ *People v. Crissman*, *supra*.

See also *State v. Westfall*, *supra*.

⁴⁶ *People v. Simon*, *supra*.

⁴⁷ *Waugh v. Glos*, 246 Ill. 604,

92 N. E. Rep. 974, (1910).

⁴⁸ *Culver v. Waters*, 248 Ill. 163, 93 N. E. Rep. 747, (1911). *Mihalik v. Glos*, 247 Ill. 597, 93 N. E. Rep. 372, (1910). *Waugh v. Glos*, 246 Ill. 604, 92 N. E. Rep. 974 (1909). *Brooke v. Glos*, 243 Ill. 392, 90 N. E. Rep. 751, (1910).

CHAPTER VI.

Proceeding in Original Registration in this Country.

§ 45. Proceeding in Chancery; Civil Action. It is an essential element of the general Torrens system that a certificate shall be created, which is conclusive evidence of an indefeasible title to registered land.¹ This creation is indispensable, but the system does not require that it shall be made in any particular manner. In foreign countries the registrar gives indefeasibility to any title as soon as he registers it, for the Torrens acts declare that the person registered as owner shall hold the title free from any adverse claims, and from incumbrances except the statutory burdens and those set forth in his certificate. But in this country a declaration of a statute cannot make an entry on a non-judicial register indisputable evidence of title,^a and it is necessary to invoke the aid of a court, wherein an applicant for registration may bring in all the world to contest his title. In this proceeding all controversies respecting the title are heard, all interests in it are determined and established, and registration is ordered. When the title is registered, and not until then, the principles of the Torrens system are brought into operation. This difference in initial registration, however, is to be observed: In foreign countries first registration ipso facto makes the title indefeasible and indisputable, but in this country first registration does not place the title beyond dispute, and, in order to know that it is indefeasible, inquiry must be made into it and into the proceeding to register it. The decisions which are referred to in this chapter relate to

¹ § 161, post.

^a § 64, post.

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unregistered land and to so much of Torrens acts as provides for original registration of titles to unregistered lands, but they do not relate to any principle of the Torrens system of conveyancing, for there is no decision in this country respecting registered lands and rights in them. Perhaps it is pertinent here to suggest that if the proceedings to establish and confirm titles to land for the purpose of registering them are superior to the ordinary methods of removing clouds and quieting titles, the state, which is deeply interested in the stability of titles, should adopt them as a substitute for bills to remove clouds and quiet titles.

In the early applications under the Torrens act in the state of Illinois it was insisted that the proceedings under the act were *sui generis*, and that the rules of practice and evidence which obtained in ordinary proceedings in court did not apply. The lower courts were inclined to this view and so held in several cases. But it is now the settled law of that state that such applications are proceedings in chancery and are governed by the rules of practice, evidence and procedure in chancery.² When the registration act contains no definite and express directions as to the method and mode of procedure under it, all rules and principles of law applicable to equitable actions, and all rules of practice with respect to the trial, introduction of evidence, findings and judgment, so far as applicable, should be followed and applied. Where issue is joined in such proceedings, the finding of facts and conclusions of law should be made as in ordinary cases.³ It is provided in the New York act that "the action shall be governed by, and shall proceed according to, the laws of this state and the rules of court, relative to an action in the supreme court, as far as the same are applicable and are not abrogated or modified by this act."⁴ The Minnesota act provides that "the case shall be tried by the court in like manner as an ordinary civil action."⁵

² *People v. Simon*, 176 Ill. 165, 52 N. E. Rep. 910, 68 Am. St. Rep. 175, 44 L. E. A. 801, (1898); *Gage v. Consumers' Co.*, 194 Ill. 30, 64 N. E. Rep. 653, (1901); *O'Laughlin v. Covell*, 222 Ill. 162, 78 N. E. Rep. 59, (1906).

³ *Owsley v. Johnson*, 95 Minn. 168, 103 N. W. Rep. 903, (1905). In *re Kuby*, — Minn. —, 130 N. W. Rep. 1100, (1911).

⁴ § 17 N. Y. act.

⁵ § 19 act of 1905.

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The relation of the examiner of titles to the court and to the parties to the application is analogous to that of the master in chancery in other chancery cases. Specific objections and exceptions must be made to the rulings of the examiner on the hearing of the application. Objection to the competency of a witness or to the testimony given by him must be raised before the examiner and by exception to the examiner's report.⁶ If the parties are content with the findings of the examiner, and make no objection or exception thereto, they cannot complain if the report is adopted by the court; but if the findings are excepted to, they may require the court to pass on them and approve or disregard them, as they may appear to be in accordance with or against the weight of the evidence. If no objection is made to the sufficiency of the applicant's evidence by exception to the examiner's report, such objection is waived.⁷ In a proceeding for registration of title the same rules apply to the mode of preserving for review objections to the report of the examiner of title as are applicable to the objections to the report of a master in chancery. Objections to the examiner's rulings on evidence should be made before his report is returned, and, if not acted on favorably by the examiner, should be renewed before the chancellor as exceptions to the report. An objection to the report of the examiner of titles is in the nature of a special demurrer, and it must point out the grounds of objection with clearness and certainty. An objection that the examiner erred in finding that the applicant for registration was seized of a title in fee is not sufficiently specific to preserve the question as to the sufficiency of the preliminary proof for the admission of abstracts of title in evidence.⁸ An applicant for initial registration of title should introduce his evidence before the examiner of titles, on notice to the defendants, in such form that the latter may preserve their rights for review by objection to the evidence.⁹ While the ex-

⁶ O'Laughlin v. Covell, 222 Ill. 162, 78 N. E. Rep. 59 (1906). *Glos v. Holberg*, 220 Ill. 167, 77 N. E. Rep. 80, (1906). See § 24 Washington act.

⁷ Gage v. Consumers' Co., 194 Ill. 30, 64 N. E. Rep. 653, (1901).

⁸ *Glos v. Hoban*, 212 Ill. 223, 72 N. E. Rep. 1, (1904).

⁹ *Glos v. Holberg*, 220 Ill. 167, 77 N. E. Rep. 80, (1906); *Glos v. Association*, 229 Ill. 387, 82 N. E. Rep. 304, (1907).

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aminer of titles is not required to report to the court more than the substance of the proof submitted to him, except upon the request of some party or by direction of the court, yet he should so far report the evidence as to show its introduction before him, and, in case secondary evidence has been received, that a proper foundation for its introduction was laid.¹⁰ It is the duty of the examiner to report the evidence submitted to him if requested to do so by a party to the action. If he fails or refuses to do so, such party may apply to court for a rule on him, but if no rule is applied for, the party on appeal cannot complain that his request was not complied with.¹¹ The parties to an application to register a title may not urge on appeal that the examiner failed to return the evidence, where they failed to ask the trial court for a rule on the examiner to report and file it.¹² If the report of an examiner of titles contains sufficient evidence, competent to support his findings, it will be presumed by a court of review that he considered only competent evidence in making his findings.¹³ Where the examiner erroneously refused to admit evidence which was offered, it is proper practice for the reviewing court to re-refer the cause to the examiner to hear such evidence. If the examiner dies before hearing this evidence, a new examiner may hear and report it, and the court may base its findings on the two reports.¹⁴ In Massachusetts where an appeal is taken from an order of the court, overruling or sustaining exceptions to a master's report, the whole record is before the appellate court, and it may direct what the final decree shall be; but where the correctness of the order is brought up by bill of exceptions, the case must go back to the court below for further hearing.¹⁵

§ 46. In the absence of a statute making abstracts of title *prima facie* evidence of title, an examiner cannot consider abstracts for the introduction of which in evidence no proper foundation has been laid, nor can he base his report on an ex

¹⁰ *Glos v. Holberg*, 220 Ill. 167, 77 N. E. Rep. 80, (1906).

¹¹ *Mundt v. Glos*, 246 Ill. 636, 93 N. E. Rep. 49, (1910).

¹² *Cregar v. Spitzer*, 244 Ill. 208, 91 N. E. Rep. 418, (1910).

¹³ *McMahon v. Rowley*, 238 Ill. 31, 87 N. E. Rep. 66, (1908).

¹⁴ *McMahon v. Rowley*, *supra*.

¹⁵ *Welsh v. Briggs*, 204 Mass. 540, 90 N. E. Rep. 1146, (1910).

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parte examination of such abstracts, or on the original court records, or on the records of the recorder's office of the county.¹⁶ In the absence of such a statute, it is error to permit petitioner, over specific objection, to introduce in evidence an abstract of title showing record of conveyances which were indispensable links in petitioner's chain of title, without requiring any preliminary proof which might render the abstract admissible as secondary evidence.¹⁷ An abstract of title may be read in evidence only when it is shown by preliminary proof in accordance with the statute that the original recorded instrument has been lost or destroyed, or that it is not within the power of the party wishing to use it to produce it, and that the record thereof has been destroyed.¹⁸ Where a statute provides that an examiner may receive in evidence any abstract of title or certified copy thereof, made in the ordinary course of business by the makers of abstracts, evidence must first be given as to when, where and under what circumstances the abstract to be offered in evidence was made. An abstract, purporting to consist of copies of a number of distinct examinations of title, made at different times by different abstract makers, is not admissible in a proceeding to register a title to land, without proof that they were made in the ordinary course of business. Where a witness testifies that an abstract was made in due course of business, but it appears from his testimony that he had nothing to do with making it, that he knows nothing about any order given for it, and that he testifies merely from an examination of the abstract, the abstract is not admissible in evidence.¹⁹ The statute of Illinois, amendment of 1907, authorizes the admission in evidence of "any abstract of title, or certified copy thereof, made in the ordinary course of business by makers of abstracts." Under this act testimony that an abstract of title was "ordered in the regular

¹⁶ *Glos v. Holberg*, 220 Ill. 167, 77 N. E. Rep. 80, (1906); *Glos v. Cessna*, 207 Ill. 69, 69 N. E. Rep. 634, (1904); *Glos v. Kingman*, 207 Ill. 26, 69 N. E. Rep. 632, (1904); *Glos v. Talcott*, 213 Ill. 81, 72 N. E. Rep. 707, (1905); *Glos v. Wheeler*, 229 Ill. 272, 82 N. E. Rep. 234, (1907).

¹⁷ *Glos v. Hallowell*, 190 Ill. 65, 60 N. E. Rep. 62, (1901); *Messenger v. Messenger*, 223 Ill. 282, 79 N. E. Rep. 27, (1906).

¹⁸ *Glos v. Wheeler*, 229 Ill. 272, 82 N. E. Rep. 234, (1907).

¹⁹ *Waugh v. Glos*, 246 Ill. 604, 92 N. E. Rep. 974, (1910).

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course of business'' from a company engaged in the business of making abstracts of title is not sufficient to entitle such abstract to admission. The statute does not suggest how abstracts shall be ordered, in order to make them admissible in evidence, but it does provide that they shall be made in the ordinary course of business.²⁰

§ 47. The court may decree registration of title as to such portion of the premises as the evidence shows the applicant to have title to in fee, even though it be less in extent than the premises described in the application.²¹ Tax liens held by the state of Minnesota are within the terms of its land registration act, and it must be made a party defendant in proceedings under that act wherever it has "an interest in or lien upon" the land in suit.²² If the examiner finds a tax deed to be void and recommends reimbursement of the defendant thereunder as a condition precedent to registering the title, but the defendant objects, insisting that such deed is valid, he cannot complain that the applicant dismisses his application as to so much of the property as is covered by the tax deed, and takes a decree for the remaining property described in the application.²³ There is a distinction to be drawn between a bill to remove a cloud and an application to register a title under the land registration act. In the first case, when the plaintiff has shown a *prima facie* title in the premises, he must also show the invalidity of the defendant's claim. Under the registration act, however, when the applicant establishes his right to have his title registered, the establishment of any adverse interest of title rests upon the party relying on it, and the applicant is not required, in the first instance, to show its invalidity.²⁴ When the applicant to register a title produces evidence establishing title in him, defendants must prove their claims, and hence the burden is not on him to show the in-

²⁰ *Culver v. Waters*, 248 Ill. 163, 93 N. E. Rep. 747, (1911).

²¹ *Glos v. Holberg*, 220 Ill. 167, 77 N. E. Rep. 80, (1906).

²² *National Co. v. Hopkins*, 96 Minn. 119, 104 N. W. Rep. 678 & 816 (1905).

²³ *Glos v. Murphy*, 225 Ill. 58, 80 N. E. Rep. 559, (1907).

²⁴ *Glos v. Holberg*, 220 Ill. 167, 77 N. E. Rep. 80, (1906); *Glos v. Hoban*, 212 Ill. 223, 72 N. E. Rep. 1, (1904); *Reed v. Siddall*, 94 Minn. 216, 102 N. W. Rep. 453, (1905).

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validity of tax deeds claimed to be clouds on his title.²⁵ The purpose and object of registration acts is to provide a speedy and summary method of determining rights and interests in real estate, and by decree to establish and declare them. The court may determine the existence, place and validity of liens on the land, but in such a proceeding may not foreclose them. The filing of an answer in such a proceeding, setting up the existence of a mechanic's lien, is not equivalent to the commencement of an action to foreclose the lien, and does not operate to continue the lien in force beyond the period limited for the foreclosure of it by the general law.²⁶ It is essential that the conveyances under which the applicant claims shall identify the premises so that they may be ascertained by the description, and where conveyances describing the property as being a lot or block in a subdivision are put in evidence, the plat of the subdivision itself must be put in evidence to identify and locate the property.²⁷ An applicant for registration of title must prove the condition of the land as to possession, and if he alleges that the land is unoccupied, he should prove the fact. The allegation is not a negative one which requires no proof, and the application itself is not evidence of the fact.²⁸ Without proof as to who is in possession of premises if occupied, or that they are vacant and unoccupied, it is impossible for the court to determine whether or not the title is rested in the applicant against the whole world.²⁹ It is error to decree registration if the proof fails to identify the premises occupied by the applicant as the premises described in the application.³⁰

§ 48. When the name of a claimant is known to an applicant from any source of knowledge, information, notice or belief, the name of such claimant must appear in the summons. He must be personally served if possible, but if his place of residence is unknown and he cannot be found, he must be served by publication in which his name appears in the summons.

²⁵ McMahon v. Rowley, 238 Ill. 31, 87 N. E. Rep. 66, (1908).

²⁶ Reed v. Siddall, 94 Minn. 216, 102 N. W. Rep. 453, (1905).

²⁷ Glos v. Ehrhardt, 224 Ill. 532, 79 N. E. Rep. 605, (1906); Glos v. Bragdon, 229 Ill. 223, 82 N. E. Rep. 224, (1907); Glos v. Associa-

tion, 229 Ill. 387, 82 N. E. Rep. 304, (1907).

²⁸ Jackson v. Glos, 243 Ill. 280, 90 N. E. Rep. 717, (1910).

²⁹ Brooke v. Glos, 243 Ill. 392, 90 N. E. Rep. 751, (1910).

³⁰ Milhalik v. Glos, 247 Ill. 597, 93 N. E. Rep. 372, (1910)

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As he is not an "unknown" party to the suit, an "unknown owner" or merely a person "to whom it may concern," the concealment by the applicant of the adverse claim or interest is a fraud on the claimant, and the concealment by the applicant of his knowledge of the claim is a fraud on the court, and the decree entered in the cause may be set aside as of no force or affect against the claimant.³¹ Where the examiner suggests that a certain party named by him be made a defendant, but the suggestion is not observed, and on the contrary is entirely ignored, the judgment thereupon entered is invalid and void as against such party and as against all persons in privity with him and not made defendants to the proceeding.³² In an application for registration it is plaintiff's duty to name as parties defendant all persons having an interest in the property. Any person having such interest and not made a party is not bound to rely on the non-conclusiveness of any judgment therein, as against his interest, but is entitled to appear in the action, whether to support and assert his rights by answer setting up his precise interest, or to set up a cross-demand to have his title registered in him. He may appear, though time for defendants to answer or demur has expired, and his motive in applying for leave to appear is immaterial where he shows he has an interest.³³ In some states an abutting owner of land is not a necessary party to a proceeding in registration. Where two persons own adjoining lots with a party wall standing on the line between the lots, and one seeks to register his title, the other will not be granted leave to become a party to such registration proceedings if the plaintiff will stipulate that in any judgment or decree which may be entered, and in any certificate which may be issued, a recital shall be placed stating that it is without prejudice to the rights, if any, of the abuttor.³⁴ A claimant of a mechanic's lien on a platted lot, whose lien statement does not describe the right lot, in consequence of which he is not named as defendant in a proceeding to register title, is

³¹ Baart v. Martin, 99 Minn. 197, 108 N. W. Rep. 945, (1906).

³² Dewey v. Kimball, 89 Minn. 454, 95 N. W. Rep. 317, 895, 96 N. W. Rep. 704, (1903).

³³ Hawes v. U. S. Trust Co., 127 N. Y. Supp. 632, (1911).

³⁴ Smith v. Martin 126 N. Y. Supp. 877, (1910).

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a party to the proceeding under the term "all other persons or parties unknown," and is bound by the decree, although it does not recognize or establish his lien.³⁵

The mere fact, that a defendant to an application appears in a case and insists that the applicant shall establish his title by competent evidence, furnishes no reason for charging the defendant with any part of the costs of the proceeding. Neither the necessity for the proceeding in registration nor the cost of it is affected by a tender to the holder of a tax title, who introduced no evidence, and the refusal of a tender is no ground for charging costs against the holder of the tax title.³⁶ Where an applicant may withdraw his application at any time before final decree, on terms to be fixed by the court, the court is not restricted to taxable costs in fixing terms, but may require applicant to pay all the expenses of defendant in the matter.³⁷ Where a petitioner for registration moves to dismiss his action without prejudice, the motion should be passed on and disposed of before any other action is taken respecting the petition; and where such a motion is denied, petitioner may appeal directly or he may take an exception under the general rules of pleading and practice.³⁸ Where an act provides for filing a map and plan of lands with the application, and this is not done, the court, on the seasonable motion of the defendant, will order it to be filed, and may dismiss the application if the order is not complied with; but a defendant, having answered to the merits, is not entitled to a dismissal because no plan was filed with the application.³⁹ A defendant to an application for registration cannot complain that the decree was entered without sufficient service by publication as to certain other defendants, where the latter were defaulted and do not complain of the decree.⁴⁰ The applicant for registration may amend his application at any time under an order of court.⁴¹ In an ap-

³⁵ *Doyle v. Wagner*, 108 Minn. 443, 122 N. W. Rep. 316, (1909).

³⁶ *Waugh v. Glos*, 246 Ill. 604, 92 N. E. Rep. 974, (1910).

³⁷ *McQuesten v. Commonwealth*, 198 Mass. 172, 83 N. E. Rep. 1037, (1908).

³⁸ *Foss v. Atkins*, 204 Mass. 337,

90 N. E. Rep. 578, (1910).

³⁹ *Welsh v. Briggs*, 204 Mass. 540, 90 N. E. Rep. 1146, (1910).

⁴⁰ *O'Laughlin v. Covell*, 222 Ill. 162, 78 N. E. Rep. 59, (1906).

⁴¹ *Glos v. Murphy*, 225 Ill. 58, 80 N. E. Rep. 559, (1907).

plication to register title to many lots, if defendant claims title to only two of such lots, a decree registering title to all the lots in which defendant had no interest and continuing the case as to the other two lots without adjudging costs against defendant, does not affect defendant, and he is not entitled to appeal or to a writ of error in advance of final determination of the title to the two lots which he claims. Defendant is not in a position in such a case to complain that applicant failed to prove title as against all the world in the lots to which the former set up no claim.⁴² On a petition to register land a decision was filed finding the applicant the owner of a part of the tract and defendants the owners of the remainder. The court then permitted defendants to substitute themselves as petitioners for registration as to their part of the land, and a decree was entered on their petition. It was held that such substitution of petitioners was not authorized by the Torrens act, that petitioners should have brought their own action, and that the decree of registration in their favor was void.⁴³

§ 49. Proceeding in Chancery— Proof must show good title against all the World. Evidence establishing good title as against the world is essential to warrant a decree awarding initial registration of title. An applicant for initial registration of title in fee simple must make such proof as warrants registration of such title as against the world, and not merely such title as would be sufficient to authorize a decree removing a cloud. If an applicant for initial registration of title in fee fails to establish such title in himself, he is not entitled either to registration of his own title, or to a decree finding that the titles of the defendants are clouds upon such prima facie title as he may have shown, and the application should be dismissed. Unless the applicant for initial registration shows a title which may be registered as against the world, the court cannot remove a tax deed alleged to be a cloud, but must dismiss the application. On appeal from a decree finding title in fee to be in the applicant for initial registration, and finding defendant's tax deed to be a cloud, the defendant may insist that the evi-

⁴² *Mundt v. Glos*, 231 Ill. 158, 83 N. E. Rep. 135, (1907).

⁴³ *Foss v. Atkins*, 204 Mass. 337, 90 N. E. Rep. 578, (1910).

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dence of such title was insufficient to warrant the decree. Title in fee simple in an applicant for initial registration is not shown by proof of deeds and receipts which are unconnected with any chain of title from the government, and which fall short of establishing the title under the statute of limitations. In discussing the subject of initial registration, it was said: "The proceeding at bar is not a bill in equity to remove a cloud, but is an application, under the statute, for the initial registration of the title to the lots. The principal object to be subserved by this statute is, to provide a system of registration whereby it shall be possible for an intending purchaser of land to ascertain, by an inspection of the register, who may convey to him the title. A proceeding under the statute, if it shall result in a decree of registration of the title of the applicant as the title in fee, should subject the titles of all parties to the proceeding, and every other title or claim to the land, to judicial investigation, in order that the true state of the title in fee should be ascertained and declared. The applicant for registration in the case at bar must therefore establish that the true title in fee is in him before he can have relief or require those whom he has brought before the court as defendants to bring their titles before the court for adjudication. If the applicant does not prove such a title as is entitled to be registered as a title in fee, he cannot have relief, either in the way of the registration of his own title or a declaration finding that the adverse claimants have no title, or that the claims are but clouds on such prima facie title as the applicant may be able to show. If the applicant in a proceeding, under the statute, for the registration of his title, produces evidence establishing title in him, then those who had been brought in, under the application, as holders of claims to the title may be required to produce proof to establish the validity of their claims to the title or to a lien on the title, as the case may be. Defendants to the proceeding may therefore be heard in the trial court to urge that the applicant has not shown a title of the nature proper to be registered, for if that be true the application should be dismissed, and that without any regard whatever to the question whether the title or claims of the defendant to the title are but mere clouds. While one who has shown a title entitled to be registered may not only have a decree to that effect, and may also have the claims of others who are defendants to his application decreed to be but clouds on his title, yet such applicant, if he fails to establish title in himself of the nature and character to be registered, cannot have a decree removing the defendants' claims as mere clouds on a mere

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prima facie case of ownership in himself, but his application should be dismissed. The appellant may therefore be heard to insist that the proofs as to title in fee of the appellee company were insufficient to support the decree. * * * We need not consider whether, in a bill in equity by the appellee company to remove appellant's tax deed as a cloud because of invalidity set forth in the bill and proven on the hearing, these deeds, tax payments and acts of the attorney of appellee in connection with the possession of the lots relied upon to constitute possession would be sufficient proof of ownership to give the complainant standing to ask a decree as owner, for the reason that, as before explained, the applicant for initial registration, under the statute, of a title as a title in fee must produce proof that he is possessed of such title, either by the production of a regular chain of conveyances from the general government, or by proof of the creation of a title by adverse, actual, open, continuous and hostile possession under claim of title for the period of twenty years, or by payment of taxes and possession of the premises under color of title, or payment of taxes alone, the premises being vacant, for the period necessary, under our statute of limitations, to the perfection of a title of that character. The claim of ownership of the appellee company was not entitled to be registered, and the application should have been dismissed. Evidence establishing title good as against the world is essential to warrant a decree awarding initial registration of a title.'"⁴⁴ And again it was said: "The purpose of the act is to establish the title and give certainty to it, so that the public, or any one dealing with the land, may ascertain the true state of the title by inspection of the register. By the act all persons are to be deemed defendants by the designation of 'all whom it may concern,' and the decree with certain limitations, is to be forever binding and conclusive upon the whole world. It was not the design of the act that a mere prima facie title should be registered as an absolute title in fee simple, and to entitle an owner to registration with such a title it should be proved. The applicant for initial registration of title in fee simple asserts that he is the owner of such title as against all the world and undertakes to establish it, and not merely such a title as would be sufficient to remove a tax deed as a cloud. The court could not order registration of title in fee simple in the applicant in this case without removing the tax deed which was alleged to be a cloud upon such title, but the court could not remove the cloud and then dismiss the petition for failure to prove the title alleged. The proof must warrant the regis-

⁴⁴ *Glos v. Kingman & Co.*, 207 Ill. 26, 69 N. E. Rep. 632, (1904).

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tration of the title to enable the court to grant the incidental relief of removing a cloud. The act was not intended to substitute a new proceeding for a bill in equity to remove a cloud, and accordingly we have decided⁴⁵ that where the proof does not authorize the registration of title, the application should be dismissed."⁴⁶

§ 50. Title Under Limitation Acts. A good and sufficient title for the purpose of registration under the act may be shown under the different statutes of limitation. In Illinois several decisions have been made with reference to attempts to establish title under such statutes. Twenty years adverse possession under section 1 of the limitation act is sufficient, but proof of a deed to the applicant for initial registration, coupled with possession by him for a period of sixteen years, but without proof of payment of taxes for at least seven successive years during that period, in accordance with the terms of the limitation act, does not show title as against the world, and the applicant must in such case show title from the government in order to be entitled to registration.⁴⁷ To establish title by limitation under section 6 of the statute of limitations, the proof must show color of title, payment of taxes for seven consecutive years by the holder of such title or some one acting for him, and continuous, uninterrupted possession for the full period of seven years, and all three conditions must exist concurrently without interruption and continue throughout the full period. Possession of land is not shown by proof of the recording of the deed, and making of entries in books with reference to the property; nor is seven years possession shown by proof that a house was built on the land by the holder of the color of title, which the witness had occupied for five years, where there is no other proof as to when the house was built or whether any other person ever occupied it.⁴⁸ Possession of land under claim and color of title made in good faith, coupled with payment of taxes on the property for a period of seven consecutive years, in the absence of any other evidence,

⁴⁵ *Glos v. Kingman & Co.*, *supra*.

⁴⁶ *Glos v. Cessna*, 207 Ill. 69, 69 N. E. Rep. 634, (1904); See also *Glos v. Holberg*, 220 Ill. 167, 77 N. E. Rep. 80, (1906); *Glos v. Wheeler*, 229 Ill. 272, 82 N. E. Rep. 234,

(1907); *Glos v. Mickow*, 211 Ill. 117, 71 N. E. Rep. 830, (1904).

⁴⁷ *Glos v. Holberg*, 220 Ill. 167, 77 N. E. Rep. 80, (1906).

⁴⁸ *Glos v. Wheeler*, 229 Ill. 272, 82 N. E. Rep. 234, (1907).

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is sufficient to authorize registration of the title. In a proceeding for registration, proof of payment of all state, county, city, town, school, road, park, drainage and corporation taxes assessed against the property raises a presumption, in the absence of evidence to the contrary, that all taxes against the property were paid during the period covered by the proof.⁴⁹ A title to a legal estate in land in fee simple, acquired under adverse possession for the requisite length of time, will be recognized and registered.⁵⁰

§ 51. Proceeding for Registration is a Lawsuit. When it was determined that in this country initial registration must be made under the terms of a decree of court, establishing and confirming the title, it was strenuously insisted by the advocates of the Torrens system that the proceeding for registering the title was not a lawsuit in any proper sense of that term. It is evident that the cases of *Glos v. Hallowell*⁵¹ and *Gage v. Consumers' Co.*,⁵² were tried and decided in the court below on the theory that such a proceeding was *sui generis* and was not governed by the general rules of a suit in chancery. In the first few applications made under the registration act in Illinois, it was held in the circuit court that defendants could not demur, but should answer within the time given. But the supreme court of that state has consistently held that the object of an application for registration is to establish and declare the title to land as against defendants and to obtain a certificate which will disclose the entire title to the land, and that in this it does not differ from any other suit in the nature of a suit to quiet title, except as provided in the act. The proceeding under the application in Illinois is taken largely from what is there known as the "burnt record act," and that is clearly adversary in its character. It is now conceded everywhere that an application to register a title by a proceeding in court is adversary, and that defendants may set up their rights, demand their equities, and proceed as in other chancery

⁴⁹ *Glos v. Mickow*, 211 Ill. 117, 71 N. E. Rep. 830, (1904); *Tobias v. Kaspzyk*, 247 Ill. 80, 93 N. E. Rep. 52, (1910).

⁵⁰ *Carino v. Insular Government, Philippine Islands*, 212 U.

S. 449, 29 Supreme Ct. Rep. 334, (1909).

⁵¹ 190 Ill. 65, 60 N. E. Rep. 62, (1901).

⁵² 194 Ill. 30, 64 N. E. Rep. 653, (1901).

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or civil cases. One may have a title which is good as against all the world, if he remains quiet and does not invoke the court to establish it as against any person, but when he brings it into court and invites others to come in and set up any interest which they may have in the land, claims which were stale and barred by the statute of limitations are given new life, and they may be pressed with vigor by the defendants. In most cases defendants are defaulted and a decree is rendered in due course, but occasionally a vigorous defense is made, and long and expensive litigation follows.⁵³

§ 52. Proceeding in Chancery—Applicant Must Do Equity.

When an owner of land applies to have it registered, he must set forth in his sworn petition "whether any other person has any estate or claims any interest in the land, in law or in equity, in possession, remainder, reversion or expectancy, and, if any, set forth the name and post-office address of every such person, and the nature of his estate or claim."⁵⁴ In such a proceeding the "court shall have power to inquire into the condition of the title to and any interest in the land, and any lien or incumbrance thereon, and to make all such orders, judgments and decrees as may be necessary to determine, establish and declare the title or interest, legal or equitable, as against all persons, known or unknown, and all liens and incumbrances existing thereon, whether by law, contract, judgment, mortgage, trust deed or otherwise, and to declare the order and preferences as between the same, and to remove clouds from the title."⁵⁵ An application was filed by Consumers' Electric Light Company to register certain lots, which set forth that Henry H. Gage, giving his address, had tax titles to the land under three tax deeds dated respectively, October 24, 1872, October 12, 1872, and March 10, 1873. Gage was made a party to the suit, and made answer by setting up his tax deeds based on sales of the property for taxes in 1869. The examiner found that Gage had no interest in the land, and so reported to the court; and the court approved the report of the examiner. On appeal to the supreme court it was urged by the company that it did not apply to have the tax deeds removed as

⁵³ See application 448 at § 108, post.

⁵⁴ § 11 Illinois act.
⁵⁵ § 15 Illinois act.

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clouds upon the title, and that nowhere in its application did it ask for the cancellation of the tax deeds or liens. But the court said: "We take the view that this was a proceeding for the cancellation of the tax deeds in order that the cloud upon appellee's title, created by them, might be removed. Such seems to us the reasonable conclusion from the consideration of the act under which this proceeding is brought. The purpose of that act, as disclosed by its many sections, is to so shape the title to real estate that the production of a single certificate of the registrar will disclose an entire title, and thus avoid research through volume after volume of records, and the cost of opinions of experts on real estate law and conveyancing as to the condition of the title. The proceeding must be brought in a court of chancery. The form of the petition is prescribed by the statute. Not only the form, but the substance, including the prayer, is set out in that act. * * * Thus, under the petition prescribed by the act, the court has power to remove clouds from the title, and we do not deem it necessary, when pleading according to a form prescribed by law, that more be stated than the act itself requires, to submit all questions that may arise under the consideration of the petition containing the averments required by the act itself." It was also insisted that, inasmuch as the court found that the tax deeds were void, the petitioner ought not to be required to reimburse the holder of such deeds; but the court held that, so far as the authority to impose the condition of re-imbursement in an order cancelling or setting aside tax deeds was concerned,⁵⁶ it was immaterial whether the petition was by the owner who held the title at the time of the tax sale, or by a subsequent owner, and it said: "So long as appellee was satisfied to let its title remain as it was, without attempting to bring it under the provisions of the Torrens act, it could do so, and appellant had no means of enforcing payment of this tax; but whenever appellee invoked the operation of the law by its petition in chancery, under which its title would be freed from the cloud created by these tax deeds, it brought itself within the rule 'that he who seeks equity must do equity,' and within the requirement of the statute that he who seeks to set aside a tax deed must pay the tax, with legal interest."⁵⁷

A decree in registration should not only require reimbursement to holders of tax deeds as a condition precedent to set-

⁵⁶ Following *Phelps v. Harding*, 87 Ill. 442; *Alexander v. Merrick*, 121 Ill. 606; *Burton v. Perry*, 146 Ill. 71, and other cases.

⁵⁷ *Gage v. Consumers' Co.*, 194 Ill. 30, 64 N. E. Rep. 653, (1901); See *Jackson v. Glos*, 243 Ill. 280, 90 N. E. Rep. 717, (1909).

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ting such deeds aside, but it should also require reimbursement as a condition precedent to registering the title. It is error to direct immediate registration of a title and to provide that if the holders of tax deeds are not reimbursed within a certain time, the decree as to so much of the land as is covered by the tax deeds shall be vacated.⁵⁸ The decree should provide, not only as a condition precedent to setting aside tax deeds, but also as a condition precedent to registering the title, that applicant pay to the holders of the tax deeds the amount found to be due them, and that, in the event of their refusal to accept it, the money due be paid into court subject to their order.⁵⁹ In a legal sense a tax deed purporting to convey a vigintillionth of a lot is not a cloud upon title, and may be disregarded by the owner of the legal title, since the fraction is so small as to be incapable of possession. The owner may stand on his legal rights, but if he comes into court and asks to have the tax deed removed as a cloud on the title, it is error to decree such removal without reimbursement to the holder of the tax deed.⁶⁰

Land Registration, No. 3494, in Chicago is *Miller v. Miller*. On September 3, 1895, Partello made a mortgage of \$1000. to Seidler, and it was recorded at once, and on November 20, 1907, he conveyed the land to Miller. On March 17, 1910, Miller filed an application to register his title to the land, making Seidler a party. The evidence showed that nothing ever had been paid on the mortgage, and applicant asked to have it removed as a cloud on his title, basing his prayer on the statute of limitations of ten years. But the court held that he must do equity, and must pay off the mortgage as a condition to registration.

§ 53. When Decree of Court Becomes Conclusive. In the Illinois act it is provided:⁶¹ "The order or decree so made and entered shall, except as herein otherwise provided, be forever binding and conclusive upon all persons, whether mentioned by name in the petition or included in 'all whom it may concern.' It shall not be an exception to such conclusiveness, that

⁵⁸ *Cregar v. Spitzer*, 244 Ill. 208,
91 N. E. Rep. 418, (1910).

⁵⁹ *Mihalik v. Glos*, 247 Ill. 597,
93 N. E. Rep. 372, (1910).

⁶⁰ *Jackson v. Glos*, 243 Ill. 280,
90 N. E. Rep. 717, (1910).

⁶¹ § 26 Illinois act.

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the person is an infant, lunatic, or is under any disability, but such person may have recourse upon the indemnity fund * * * for any loss he may suffer by reason of being so concluded.⁶² An appeal may be allowed to the supreme court * * * as in other cases in chancery. A writ of error may be sued out of the supreme court within two years after the entry of the order or decree, and not afterwards. Any person having an interest in or lien upon the land who has not been actually served with process or notified of the filing of such application, or the pendency thereof, may, at any time within two years after the entry of such order or decree, and not afterwards, appear and file his sworn answer. * * * An appeal (from the decree on this issue) may be allowed, or writ of error sued out, * * * within a like time and in like manner as in the case of an original order or decree under this act, and not otherwise."⁶³ Any person who is not bound by the decree, because of some irregularity, insufficiency or other cause, may bring an action for the recovery of the land or his interest therein within two years after the entry of the decree.⁶⁴ In California it is provided that "no person shall commence any action at law or in equity for the recovery of land, or assert any interest, right in, or lien or demand upon the same, or make entry thereon adversely to the title or interest certified in the first certificate bringing the land under the operation of this act, unless within five years after the first registration." No exception to this rule is made for an infant, lunatic or one under any disability, and any person bringing such an action must show that neither he nor those under whom he claims had actual notice of the proceedings for registration in time to appear and file his objections or assert his claim. Any such action "shall in no way effect or disturb the rights of any person in said land, acquired subsequent to the registration thereof, bona fide and without knowledge, and for a valuable consideration."⁶⁵ It is also provided: "Any per-

⁶² In § 103 it is provided that anyone under disability at the time when the action first accrues may bring an action against the indemnity fund at any time within two years after such disability is removed. §§ 25 and 102 of Oregon

act are identical with §§ 26 and 103 of the Illinois act.

⁶³ § 26 Illinois act. § 25 Oregon act.

⁶⁴ § 27 Illinois act. § 26 Oregon act.

⁶⁵ §§ 45 and 46 California act.

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son having any interest, right, title, lien, or demand, whether vested, contingent, or inchoate, in, to, or upon registered land, which existed at the time the land was first registered, and upon or for which no cause of action shall have accrued at the date of the registration of the land, may, prior to the expiration of said five years after such registration, file in the registrar's office a notice, under oath, setting forth his interest, right, title, lien, or demand, and how and under whom derived, and the character and nature thereof; and if such claim is so filed, an action may be brought to assert or recover or enforce the same at any time within one year after the right of action shall have accrued thereon, or at any time within the period of five years after said first registration, and not afterwards. It shall be the duty of a life tenant or trustee to file such claim on behalf of any remainderman or reversioner, whether the remainder or reversion be at the time vested or contingent, and of a guardian to file such claim on behalf of his ward."⁶⁶ Under the Ohio act, the decree was to be in the nature of a decree in rem, final and conclusive against everyone, but any person not having actual notice of the proceedings might within five years bring an action to establish his claim, provided such action did not "disturb the rights of any person in the land, acquired subsequent to the registration thereof, bona fide and without knowledge, and for a valuable consideration."⁶⁷ In the Minnesota act, 1905, it is provided that the decree shall be forever binding and conclusive upon all persons, whether mentioned by name in the summons or included in the phrase "all other persons or parties unknown, claiming any right," etc., and shall not be opened by reason of the absence, infancy or other disability of any person affected thereby, except that an appeal may be taken to the supreme court within six months, and except that an action attacking the validity of the decree may be commenced within six months from the date of the decree. Any person having any interest in the land, who was not served with process, and who had no notice or knowledge of the filing of the application or of the pendency of the proceeding prior to the decree, may at any time within sixty days after the entry of the decree file a peti-

⁶⁶ § 47 California act.

⁶⁷ §§ 81, 82 and 83 Ohio act.

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tion to review the case. If such a petition is granted, the case is tried *de novo*. There is no provision that a purchaser for value during the six months shall be protected.⁶⁸

§ 54. The Massachusetts act allows thirty days for an appeal from a decree in favor of an applicant,⁶⁹ and provides that the decree registering and confirming his title "shall not be opened by reason of the absence, infancy or other disability of any person affected thereby, nor by any proceeding, at law or in equity, for reversing judgments or decrees," except only that in case the decree was procured by the fraud of the applicant, a petition for review may be filed within one year, provided the rights of innocent third persons have not intervened.⁷⁰ The decree "shall bind the land and quiet the title thereto," and "shall be conclusive upon and against all persons, including the commonwealth, whether mentioned by name in the application, notice or citation, or included in the general description 'to all whom it may concern.' " In the Colorado act it is provided that the decree shall be forever binding and conclusive upon all persons whether mentioned by name or included in the expression "all other persons or parties unknown claiming," etc., and shall not be opened by reason of absence, infancy or other disability, except that an appeal may be taken to the supreme court as in other cases, and except that within ninety days, any person who is not bound by the decree, because of some irregularity in or insufficiency of the proceedings, may bring an action for the recovery of the land or his interest therein. Any person who has an interest in the land, and who was not served with process, and who had no notice of the filing or pendency of the application, may appear and file his petition to be heard at any time within ninety days after the entry of the decree, provided no innocent purchaser for value has acquired an interest.⁷¹ In the Washington act it is provided that the decree shall be forever binding and conclusive upon all persons whether mentioned by name in the application or included in "all other persons or parties unknown claiming," etc., and

⁶⁸ §§ 25, 27 and 28 Minnesota act, 1905.

⁶⁹ § 13 Massachusetts act.

⁷⁰ § 37 Massachusetts act.

⁷¹ §§ 27, 28 and 29 Colorado act.

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that it shall not be opened by reason of the absence, infancy or other disability of any person affected thereby. An appeal may be taken as in other civil cases. Any person interested in the land, who was not served with process or notified of the filing or pendency of the application, may appear and file a petition to be heard within ninety days after the entry of the decree, provided no innocent purchaser for value has acquired an interest.⁷² In the New York act it is provided that the judgment shall be forever binding and conclusive upon the state of New York and all persons in the world, whether mentioned and served with summons and notice specifically by name, or included in the description, "all other persons, if any, having any right" etc. It shall not be an exception to such conclusiveness that any such person is an infant, lunatic or is under any other disability or is not yet in being. Within ten years after the entry of the decree, a proceeding may be commenced to set it aside for fraud, but such proceeding shall not affect the rights of an innocent purchaser or incumbrancer for value, who has no actual notice of the fraud. No action, except for fraudulent registration, may be commenced to set aside the judgment, or to affect it, after six months from the entry of it.⁷³ In Hawaii and the Philippine Islands, "every decree of registration of absolute title shall bind the land and quiet the title thereto. * * * It shall be conclusive upon and against all persons, including the Territory, whether mentioned by name in the application, notice or citation, or included in the general description 'to all whom it may concern.' Such decree shall not be opened by reason of the absence, infancy or other disability of any person affected thereby, nor by any proceeding at law or in equity for reversing judgments or decrees," subject only to the right of appeal as in other cases. A petition for review may be filed within one year where the decree has been obtained by fraud, provided no innocent purchaser for value has acquired an interest.⁷⁴

§ 55. When Decree of Court is Conclusive—Writ of Error—Appeal. It is to be noticed that under all the acts the decree

72 §§ 27 and 28 Washington act. 74 § 38 Hawaiian act. § 38 Philippine act.
73 §§ 23 and 24 New York act.

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is declared to be conclusive against infants, lunatics and others under disability. Since the federal constitution does not confer upon minors or others under disability any special rights or privileges, it is competent for the legislature of any state, in the absence of restrictions in the state constitution, to conclude them by the decrees of its courts, just as it concludes other persons.⁷⁵ In the Illinois, Oregon and Minnesota acts there is no provision that an innocent purchaser for value, during the period within which the decree may be reviewed or set aside, shall be protected. The lack of such a provision does not tend to promote immediately the scheme of the Torrens system, which is for indefeasible titles. The right to review the proceedings in registration is a substantial right under these acts. It is of value to the persons who may assert the right, and it is an impediment to a title just registered. It has been said that the right to sue out a writ of error within two years under the Illinois act "can have no unfavorable effect upon the negotiability of a registered title during its first two years," because "all persons named as defendants and served with process are bound by the decree from its entry."⁷⁶ This statement of the law is manifestly erroneous, for the right to sue out the writ is general in the statute; it is not confined to any class of defendants. It applies equally to defendants served with process and to those constructively served. Two years must elapse from the date of the entry of the decree before it becomes absolute against any of the defendants. It was this fact which prompted the promoters of the Torrens system in Illinois to procure the American Surety Company of New York to issue bonds "guaranteeing the performance of warranties of title contained in instruments of conveyance of land upon which the registrar's certificate of title has issued under the Torrens law." In the advertisement of that company inserted in Mr. Sheldon's book, it is stated: "Such bonds run for the minimum period of five years, which is sufficiently long to cover the term during which the certificate of title is not conclusive evidence of title." Under some of the acts, protection is given to purchasers for value during

⁷⁵ *Vance v. Vance*, 108 U. S. 514. in Illinois, p. 36.

⁷⁶ Sheldon's Land Registration

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the period of limitation.⁷⁷ In Illinois there is a difference of opinion among lawyers as to whether a purchaser for value during the two years limitation will be protected, where no appeal is prayed or pending. Under the chancery jurisprudence of that state it is well established that the right to sue out a writ of error does not deprive a purchaser for value of the right to the protection of a decree of a court of chancery; that such a purchaser will be protected even though he knew, when he paid out his money, that a writ of error was pending to reverse the decree; that nothing short of a stay order or a writ of supersedeas will deprive him of his right to rely on the decree.⁷⁸ Of course, this rule may be changed by statute, and the only question is whether it has been changed by the terms of the registration act of Illinois. The proceeding in court on an application for registration is not to establish a title as an end, as is a bill to quiet title, or a suit under the burnt record act; it is merely a method or means of issuing a certificate which shall disclose and declare the whole title to a particular piece of land.⁷⁹ The decree is binding and conclusive on all persons, "except as herein otherwise provided."⁸⁰ The certificate issued under the act and under the terms of the decree is only "prima facie evidence that the provisions of the law have been complied with, and that such certificate of title has been issued in compliance with a valid order or decree, and that the title to the land is as therein stated," for two years after the rendition of the decree, and is conclusive evidence of such facts thereafter.⁸¹ This provision as to the conclusiveness of the certificate is one of the exceptions "herein otherwise provided," for if a purchaser for value within two years is protected by the decree, the decree is conclusive in his favor, while the certificate, the object and product of the decree, is not conclusive until the expiration of two years, according to the very words of the statute. On this point, as on many others, the statutes concerning regis-

⁷⁷ §§ 45, 46 California act. §§ 81, 82, 83 Ohio act. §§ 27, 28, 29 Colorado act. §§ 27, 28 Washington act.

⁷⁸ Chicago & N. W. R. R. Co. v. Garrett, 239 Ill. 297, 87 N. E. Rep.

1009, (1909).

⁷⁹ Gage v. Consumers' Co., 194 Ill. 30, 64 N. E. Rep. 653, (1901).

⁸⁰ § 26 Illinois act.

⁸¹ § 39 Illinois act. See also, § 31 New York act. § 38 Oregon act.

tration of title in that state are not clear, but it is to be noted that, by the terms of some registration acts, purchasers for value during the period of limitation are protected, while there is no such provision in the Illinois act.

§ 56. When Decree of Court Becomes Conclusive—Limitation. Concerning the limitation of sixty days in which a person might contest the validity of a decree in registration under the Minnesota act of 1901, it was said: "The time limit seems to us to be a short one, but, in view of the complete and far-reaching provisions of the act for notice to all parties, and the fact that the right of appeal as in civil actions is given, we cannot hold that the legislature arbitrarily exercised its discretion in fixing the limit."⁸² The provision of the "burnt record act" of Illinois, that the decree "shall be forever binding and conclusive, unless an appeal be taken during the term of court at which the decree shall be rendered, or a writ of error shall be sued out within twelve months from the entry of said decree," was held to be reasonable and valid against all persons who were parties to the suit.⁸³ The limitation of two years in the Torrens act of Illinois is reasonable so far as it affects the rights of those who have had due notice of the proceeding. The Massachusetts act makes the decree conclusive upon all persons from the time it is entered, unless an appeal is taken within thirty days. All the other acts substantially provide that a person who was not served with process, or who had no notice of the filing or pendency of the proceeding, may file a petition for a review of the case within a given time. This time is fixed at five years in California, two years in Illinois and Oregon, six months in New York, ninety days in Colorado and Washington, and sixty days in Minnesota. In discussing generally the provisions of the Illinois act, the supreme court of that state said:

"Objection is made that by section 26 any person who has any interest in the land, whether personally served, notified by publication or not served at all, must, within two years after the entry of the decree, appear and file an answer, and that

⁸² State ex rel v. Westfall, 85 Minn. 437, 89 N. W. Rep. 175, 54 C. L. J. 282, 89 Am. St. Rep. 571, 57 L. R. A. 297, (1902).

⁸³ Bertrand v. Taylor, 87 Ill.

235. Persons under disability have, under that act, two years after their disabilities are removed, in which to prosecute a writ of error.

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after the expiration of that term of two years the decree shall, with certain exceptions, be 'forever binding and conclusive upon all persons.' This provision seems to attempt to make a decree binding upon persons not parties to the suit, and if given effect literally would deprive persons of vested rights without due process of law. A limitation may be placed upon the time within which a person who has a mere right of action shall bring it, but 'limitation laws cannot compel a resort to legal proceedings by one who is already in the complete enjoyment of all he claims.'⁸⁴ To the extent that the act attempts to transfer property without due process of law it cannot be upheld. On all parties to the suit properly before the court the decree may, after the lapse of two years, become conclusive and forever binding, and as to all who have merely a right of action the expiration of two years may complete the bar. Even though the language of this section may be broad enough to amount to an attempt to transfer an estate by the law or by decree, yet it is possible to carry out the purposes of the act without violating the constitution in the respect complained of.'⁸⁵

It may be assumed that neither the decree nor the statute of limitations will bind a person in possession of the land, not served with summons,⁸⁶ and that the provisions of the acts now under discussion were not aimed at such a person. These provisions were evidently intended to apply to persons made defendants to proceedings in registration either by name or under the general designation of "unknown owners," "unknown persons claiming an interest" etc., who had never had actual notice of the proceeding, though served by publication of notice, either by name or under such general designation. None of the other courts, in considering the constitutionality of the initial proceeding under the Torrens laws, have treated the subject under discussion in the manner above quoted.

§ 57. Effect of Decree—Effect of Limitation. At the time this country was first settled, no such thing was known as a judgment against a defendant before he entered an appearance in court, even if he had been personally served with process. If he did not appear after service of process, his goods were distrained until they were exhausted or until he appeared in

⁸⁴ Cooley's Const. Lim. p. 366.

(1898).

⁸⁵ *People v. Simon*, 176 Ill. 165, p. 177, 52 N. E. Rep. 910, 68 Am. St. Rep. 175, 44 L. R. A. 801,

⁸⁶ *State v. Westfall*, 85 Minn. 437; *People v. Simon*, *supra*.

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court as commanded by the summons. Afterward statutes were passed permitting proofs to be heard and judgment to be rendered in the absence of a defendant personally served and not appearing.⁸⁷ Presently the doctrine of substituted service on defendants in equity was developed and decrees were rendered against absent defendants who had been served by publication of notice of the pendency of the suit. It has long been a principle of our jurisprudence, founded on a sense of abstract justice, that a defendant has a right to be heard in review of a decree rendered under a statute authorizing a decree to be rendered against him in his absence and on substituted service, if he did not actually have notice of the proceeding before the decree was rendered, and that if a decree on default is based on any service of process, other than personal service, provision should be made, giving to a defendant an opportunity to have it reviewed, if he did not in fact have notice of the proceeding before the decree was entered. Until recently it has been assumed quite generally in this country that in an action in the nature of a suit to quiet title, the decree does not operate *ex proprio vigore* to cut off the rights of persons served by publication of summons either by name or under the general designation of "unknown owners," "unknown persons claiming an interest" etc., or "to whom it may concern"; that it is necessary to fix a period after the entry of the decree within which such persons may assert their rights in the land; that the decree becomes a starting point for the fixed period of limitation, and that the rights of such persons are barred by failure to assert them within such time. The Massachusetts act and the McEnerny act of California seem to hold that the legislature may create a new action, strictly in rem, in which the decree may cut off the rights of such persons on the day on which it is rendered. There are those who contend that a statute may make a decree in such an action binding and conclusive against such persons, and therefore against all the world, from the date of its entry,—if not by its own force, then as a period of limitation.⁸⁸ The ground of the contention is that the court obtains control of the

⁸⁷ See *Tyler v. Judges*, 175 Mass. 71, on p. 89, (1900).

⁸⁸ *People v. Simon*, 176 Ill. 165.

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land when the action is commenced, and that the legislature fixes the time of the entry of the decree as the period within which all rights in the land must be asserted. If A. takes possession of B.'s land, occupies it for the period of the statute of limitations, openly and notoriously claiming to own it, and brings himself in all respects within the terms and provisions of the statute, he becomes the owner of it, without a conveyance from B., without any notice to B., without a judicial proceeding of any kind, and without any process of law against B., except the time and opportunity which B. had to discover that his rights were in peril and to proceed to assert them. If the state may declare that B. must assert his title against A. within the period of limitation, then it may also declare that, unless B. shall appear in court and assert his interest in the land whenever A. shall institute an action, give reasonable notice to impart knowledge of the pendency of the proceeding and comply with the terms of the act under which the proceeding is brought, he shall be absolutely bound by the decree. Such is the argument in favor of the conclusiveness of a decree which the statute makes binding on all the world. The precise point under discussion was decided in two cases involving the constitutionality of acts which made decrees immediately conclusive against all persons.⁸⁹

§ 58. In the California case it was said:

"The principal contention upon this question of due process is that the act is unconstitutional in that it seeks to bar by the decree the rights of unknown owners, that is, those who are not alleged in the complaint or the affidavit to claim any interest in the property, and who cannot have any notice of the fact that their rights are involved, other than the general notice given by the posting and publication. * * * * The validity of such judgments against known residents is based upon the ground that the state has power to provide for the determination of titles to real estate within its borders, and that as against non-resident defendants or others who cannot be served in the state, a substituted service is permissible, as being the only service possible. These grounds apply with equal force to unknown claimants. The power of the state as to titles should not be limited to settling them as against per-

⁸⁹ Tyler v. Judges, 175 Mass. 71, (1900); Title Co. v. Kerrigan, 150 55 N. E. Rep. 812, 51 L. R. A. 433, Cal. 289 88 Pac. Rep. 356, (1907).

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sons named. In order to exercise this power to the fullest extent it is necessary that it should be made to operate on all interests, known and unknown." And again it was said in that case: "The state has power to enact statutes under which the interests of persons in property within the state shall be affected so far as that property alone is concerned, and the action to quiet title, although originally under the old chancery practice merely a personal action against the defendant, may by statute be so extended as to permit the court to bind the interest of the defendant in the property, even though such defendant may not have been personally served with process within the state."⁹⁰ In speaking of the Massachusetts act it was said in the Tyler case: "If it does not satisfy the constitution, a judicial proceeding to clear titles against all the world hardly is possible; for the very meaning of such a proceeding is to get rid of unknown as well as known claimants,—indeed, certainty against the unknown may be said to be its chief end,—and unknown claimants cannot be dealt with by personal service upon the claimant. * * * In *Hamilton v. Brown*,⁹¹ it was declared to be within the power of the state 'to provide for determining and quieting the title to real estate within the limits of the state and within the jurisdiction of the court after actual notice to all known claimants and notice by publication to all other persons'. I doubt whether the court will not take the further step, when necessary, and declare the power of the states to do the same thing after notice by publication alone."⁹²

A statute provides that no action for the foreclosure of any lien against registered land, in existence at the date of

⁹⁰ Citing *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 111. *Arndt v. Griggs*, 134 U. S. 316; 10 Sup. Ct. Rep. 557, 33 L. Ed. 918, explaining *Hart v. Sansom*, 110 U. S. 151; *Lynch v. Murphy*, 161 U. S. 247; *Roller v. Holley*, 176 U. S. 398, 44 L. Ed. 520; *Dillon v. Heller*, 39 Kan. 599; *Shepard v. Ware*, 46 Minn. 174; *Sloane v. Martin*, 145 N. Y. 524; *Lantry v. Parker*, 37 Neb. 353; *Perkins v. Wakeham*, 86 Cal. 580, 25 Pac. Rep. 51, 21 Am. St. Rep. 67; *State v. Westfall*, 85 Minn. 437, 89 N. W. Rep. 175, 89 Am. St. Rep. 571; However, in connection with that section of the act, which provided that the decree should be binding on all persons, it is to be noted that the supreme court of

California, in the case of *Title Co. v. Kerrigan*, *supra*, read into the act under consideration a provision of the general code of civil procedure (§ 473), declaring that any person interested and having no actual notice of the decree, may come into court at any time within a year after its rendition, and, upon showing cause, may have the decree vacated as to him, and be allowed to answer to the merits. The supreme court of the United States in *American Land Co. v. Zeiss*, 219 U. S. 47, 31 Sup. Ct. Rep. 200 (1911), upheld the constitutionality of the same act, referring to the construction given to it by the supreme court of California.

⁹¹ 161 U. S. 256, 274.

⁹² See *Huling v. Kaw Valley Im-*

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the original decree of registration, and which is not recognized and established by such decree, shall be maintained, unless such action is commenced within six months from the date of the decree, and that no action shall be commenced by any person who is bound by the decree. It was held that a person having an unrecorded lien on the land at the time of the filing of the application is to be considered as a party to the proceeding and bound by the decree, where the proceeding was regular and in good faith, without notice of the unrecorded lien, and all interested unknown persons were duly served by publication.⁹³

§ 59. Comment on Conclusiveness of Decrees. The law is not a fixed science, but is an expanding evolution of social and governmental relations. It is evident that the trend of legislation is toward the passing of statutes making decrees of court conclusive, either at once or within a very short time, and that courts are inclined to sustain such statutes. There is a general feeling that all saving clauses in statutes, by which persons of any description are given time beyond the decree for the assertion of their rights, are unscientific and unnecessary for the administration of the law and of justice. Suits to quiet, confirm and establish titles are very numerous, but instances in which injustice was done by the entry of a decree in such a case, and in which the injustice was corrected by a proceeding begun within the period for reviewing the decree, are not numerous.⁹⁴ Stale, vague and neglected interests in the title to land are a hindrance to its merchantability, and it reasonably may be insisted that those who hold them shall place on record some notice of their names, addresses and interests, or shall take some steps to assert their interests, prior to the entry of a decree quieting title against them, and not afterward. A non-resident owner, not in possession, should take measures for the protection of his rights in case

provement Co., 130 U. S. 559, 564. There are authorities opposed to the views expressed in these cases. See *Hill v. Henry*, 66 N. J. Eq. 150; 57 Atl. Rep. 554 and the dissenting opinion in the *Tyler* case. See also *State v. Guilbert*, 56 Ohio St.

575; 47 N. E. Rep. 551; 60 Am. St. Rep. 756. (1897).

⁹³ *Doyle v. Wagner*, 108 Minn. 443; 122 N. W. Rep. 316 (1909).

⁹⁴ We are discussing the conclusiveness of decrees apart from any consideration of fraud.

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they are attacked.⁹⁵ In other words, a person claiming an interest in lands may be called upon to exercise some such diligence in protecting his interest as he would exercise in his commercial affairs. After all, it may be merely a question of policy whether the law shall be most favorable to the interests of those who have uncertain claims, or who have not taken the means to make their names and addresses known, as claimants of the land, or of those who own the lands, occupy them or pay taxes on them, and desire to deal with them.

In this connection there is a matter of prime importance. The general laws of a state, regulating the procedure and practice in suits to quiet and establish title, and regulating the force and effect of decrees in such actions, should be the same as any law of a special nature passed in that state for a similar purpose. There should be one trend or policy in all laws and proceedings having the same general object in view. The process and service of process of the court, the requirements for and time of publication of notice, the mailing of notice, the conclusiveness of the decree, the right to appeal or sue out a writ of error, the rights of innocent purchasers for value during any limitation, and the rights of persons under disability should be the same in every proceeding in the nature of a suit to quiet title in that state. It is confusing to inject into the laws of the state a new set of laws, the purport of which is at variance with the spirit of the laws which have developed in its jurisprudence during a series of years, especially if the two sets of laws are to be concurrently administered. Each system of laws is certain to have a modifying effect on the other, and confusion and uncertainty is sure to follow. In Illinois, a decree under the "burnt record act" is conclusive against persons not under disability in one year after its entry, while a decree under the Torrens act is not conclusive until two years thereafter; persons under disability have two years after their disabilities are removed to prosecute a writ of error under the "burnt record act", while

⁹⁵ See *Huling v. Kaw Valley*, *supra*.

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they are barred under the Torrens act after two years from the entry of the decree. In California, the requirements for obtaining notice by publication against unknown claimants in the land and against defendants not found in the state are much more general in the McEnerney act, 1906, than they are in the Torrens act, 1897, and the decree under the McEnerney act is declared to be binding and conclusive against all the world from the time it is entered, though the supreme court holds that it is not binding for one year under a provision of the general code, while under the Torrens act it is not conclusive for five years. Such contrariety of statutory provisions in the laws of a state are deplorable, and they indicate a lack of thoughtfulness and a total disregard of harmony and symmetry.⁹⁶

§ 60. Effect of Decree Bringing Land under Act. The bringing of land under the registration act implies an agreement running with the land, binding upon the applicant and all persons claiming title or an interest under him, that the property shall be subject to the terms of the act and all amendments thereto; and that all subsequent dealings with the property shall be subject to the terms of the act.⁹⁷ It goes without saying that the terms of the act, which bind an applicant and those claiming under him, and which bind property brought under the act, must be constitutional and legal terms. Those which are not valid bind nothing and no one, and this section does not have the force and effect which its exact words may imply.

§ 61. When Trustee may make Application for Registration. According to the provisions of some acts a trustee may make application for registration unless he is prohibited from so doing by the terms of the instrument creating the trust.⁹⁸ Under some acts the person or persons who claim to have the

⁹⁶ The McEnerney act is set forth in full in *American Land Co. v. Zeiss*, *supra*.

⁹⁷ § 36 New York act. § 23 Minnesota act. § 33 Colorado act. § 44 Massachusetts act. § 33 Washington act. § 45 Oregon act. § 46 Illinois act. § 44 California act.

§ 45 Hawaiian act. § 45 Philippine act.

⁹⁸ § 68 Massachusetts act. § 69 Hawaiian act. § 69 Philippine act. § 66 Colorado act. § 65 Washington act. § 70 California act. § 67 Nova Scotia act.

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power of appointing or disposing in fee simple of the legal estate in land may apply for registration.⁹⁹ A trustee with power of sale in fee simple may register the land, where the registrar is satisfied that the application is made to carry such power into effect.¹ A trustee with no power of sale in fee simple must get the consent of the person claiming to be beneficially entitled to the first estate of freehold in the land,² or to the first life estate or greater estate,³ or he must get the consent of the person beneficially interested in the land.⁴ A trustee with power of sale must get the consent to the application of any person whose consent is necessary to a sale.⁵ In England and Ontario any person holding land on trust for sale, and any trustee having a power of selling land, may apply to be registered as first proprietor, with the consent of the persons, if any, whose consent is required to the exercise by the applicant of his trust or power of sale. The amount of all necessary costs and expenses in the proceeding is ascertained and declared by the registrar, and becomes a part of the expense of administering the trust.⁶

99 § 10 New York act. § 14 New
South Wales act. § 20 Western
Australia act. § 21 Victorian act.
§ 18 New Zealand act.

1 § 27 South Australia act.

2 § 16 Queensland act. § 14 New
South Wales act.

3 14 Tasmania act.

4 § 18 New Zealand act. § 27
South Australia act.

5 18 New Zealand act. § 21 Vic-
torian act.

6 § 68 Land Transfer act. 1875
§ 8 Ontario act.

CHAPTER VII.

Certificate of Title.

§ 62. Nature of the Certificate of Title. When we shall presently determine what the essential elements of the Torrens system really are, we shall see that none of the principles of that system are brought into action until the certificate is issued. It makes no difference to the essence of the system whether the registration is made by the act of a registrar, a master of titles or a judge of a court, or whether it is registered by a decree of a court entered in an adversary action. The proceeding on an application is a mere preliminary to the first great act of the system, which is the issue of a first certificate of registration. When this certificate is issued we have a registered title, a governmental declaration of the ownership and condition of the title, and a title which may not be disputed. These are three basic elements of the Torrens system.¹

There are several kinds of Torrens certificates of title. Under the English, Ontario, Nova Scotia and Hawaiian acts there are certificates of possessory, qualified and absolute titles; under the British Columbia act there are certificates of an absolute fee and of an indefeasible fee; and under the other acts, there are certificates of an indefeasible title only. Each kind of certificates is different evidence of the title of the registered person to the estate or interest in land with which he is registered, and every certificate is some evidence of title. The nature of the evidence of certificates of possessory or qualified title has been considered.² In British Columbia the registered owner of an absolute fee is prima

¹ Post, § 161.

² Ante § 13.

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facie the owner of the estate or interest in the land described in the certificate, subject to the statutory exceptions and to the registered charges; and, subject to such exceptions and to such charges, the registered owner of an indefeasible fee is conclusively held to be the owner of the estate or interest in the land described in his certificate.³ On first registration the applicant, and on any subsequent registration the new owner, is entitled to a certificate stating the kind of title with which he is registered, and describing the estate or interest in the property of which he is the registered owner. It is at least *prima facie* evidence of the matters contained in it, so far as the act permits incidents and burdens on a title to be entered. Generally speaking, it must be produced at the registry on every dealing with the property, and, like a stock certificate, it is a document of great importance to the owner. The registered owner of a lesser estate than a fee simple is *prima facie* the owner of the estate or charge described in his certificate.⁴ An indefeasible title to land is one which gives to its holder the right to eject the whole world. Under the general Torrens system, according to which only certificates of an indefeasible title are issued, a certificate is conclusive evidence of the title, except (1) where a certificate of title of an earlier date is in existence, (2) where the land has been made, wholly or partially, the subject of a certificate of title by some mistake or through some error, not being a mistake or error of law on the part of the registrar when acting in his judicial capacity; (3) and where the certificate of title has been obtained by the holder through fraud. Unless and until it is shown to fall within one of these recognized exceptions, a certificate is conclusive evidence of title, and the burden of showing that it falls within one of the exceptions is on the person who alleges that it does.⁵ When a

³ §§ 24, 80 British Columbia act.

⁴ §§ 25-29 British Columbia act.

⁵ Lloyd v. Mayfield, 7 A. L. T. 8 (1885). Main v. Robertson, 7 A. L. T. 127 (1886). St. George v. Burnett, 10 S. A. L. R. 47 (1876). Hall v. Loder, 7 N. S. W. L. R. Eq. 44 (1885). Marsden v. McAllister, 8 N. S. W. L. R. 300 (1887). Wad-

ham v. Buttle, 13 S. A. L. R. 1 (1879). Franklin v. Ind., 17 S. A. L. R. 133 (1883). § 42 New South Wales act. § 44 Queensland act. § 69 South Australia act. § 33 Tasmania act. § 74 Victoria act. § 68 Western Australia act. §§ 75, 180 Saskatchewan act. § 44 Alberta act.

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certificate does not fall within one of these exceptions, the registered owner is declared by statute to hold the estate or interest in the land, free from all incumbrances and adverse claims, except those enumerated in the statute and those set forth in the certificate. The statutory exceptions are substantially the same in all acts, and generally speaking, in this country are (1) liens, claims or rights arising or existing under the laws or constitution of the United States, which the state cannot require to appear of record, (2) subsisting leases within a certain designated number of years, (3) taxes and special assessments, (4) public highways and easements on the land, (5) and the right of appeal or review.⁶ Experience seems to teach that to be satisfactory the register of titles must be absolute and indefeasible, and that if it is anything less, the system of registering titles loses much of its merits and most of its attractions. Accordingly, under the general system, certificates are made conclusive evidence of title and of priority of liens, except as provided otherwise in the acts, meaning by this expression, except as to the statutory burdens not covered by registration.⁷ In all courts and in all places in Illinois and Oregon until two years from the date of the decree, the original certificate is *prima facie* evidence that the title to the land is as therein stated, and after that time it is conclusive evidence of that fact.⁸ Under some of the acts the certificate relates back to and takes effect from the date of the decree of registration.⁹ Since the first registration of

⁶ § 24 Minnesota act, 1905. § 40 Illinois act. § 39 Oregon act. § 30 Colorado act. § 38 Massachusetts act. § 39 Hawaiian act. § 30 Washington act. § 32 New York act. § 34 California act. § 39 Philippine act. See §§ 7, 13, 18, English act, 1875. §§ 43, 104 Alberta act. §§ 75, 76 Saskatchewan act. § 26 Ontario act. § 80 British Columbia act. § 41 Nova Scotia act. § 70 Manitoba act. §§ 55, 56 New Zealand act. § 44 Queensland act, 1861. §§ 40, 42 New South Wales act. § 68 Western Australia act. § 33 Tasmania act. § 74 Victoria act. § 69 South Australia act. §§ 30, 34 act for Ireland, 1891.

⁷ § 46 Massachusetts act. § 47 Hawaiian act. § 47 Philippine act. § 42 Colorado act. § 41 Washington act. § 42 California act. § 40 New South Wales act. § 96 Queensland act. § 65 New Zealand act. § 69 South Australia act. § 33 Tasmania act. §§ 69, 74 Victoria act. §§ 63, 68 Western Australia act. § 180 Saskatchewan act. § 44 Alberta act. § 71 Manitoba act. § 41 Nova Scotia act. § 36 act for Ireland, 1891.

⁸ § 39 Illinois act. § 38 Oregon act. See § 31 New York act, in which the period of limitation is six months.

⁹ § 40 Washington act. § 38 Illinois act. § 37 Oregon act. § 41

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the title is founded on the decree of the court, and since the act of the registrar in this country in entering the effect of the decree on the register is merely clerical and ministerial, it would seem that the original certificate would relate back to the date of the decree, whether or not the statute so provided in express terms. In this country where an original or first certificate of title is made conclusive evidence as to all incumbrances on the land, the court must pass on the validity of all such incumbrances before issuing the certificate.¹⁰ The rights and incumbrances excepted from the operation of the certificate and from the conclusiveness thereof, including the right of appeal, must be set forth in the certificate, according to the Minnesota act, 1905, and in that state a certificate is conclusive evidence of titles, except as to the matters therein expressly set forth.¹¹ In some acts it is provided that in a suit for specific performance brought by a registered owner, and in any action or proceeding brought for ejectment, partition or possession of registered land, the certificate shall be conclusive evidence of a good and valid title, subject to such matters as may be noted therein.¹² Since in other sections of the acts the certificate is declared to be conclusive, this provision seems to be unnecessary.

§ 63. In perhaps all the registration acts there is a provision that, in case of a variance between the owner's duplicate and the original certificate, the original shall prevail. The original certificate is the official public register of the title, and according to the theory of the registration system, it should prevail, even though the statute does not expressly so declare. The term, "certificate of title," includes all memorials and notations contained in any certificate, and the owner of any interest or estate less than a fee simple is protected by the entry on the certificate of a memorial of his interest. The expression

Colorado act. § 42 Hawaiian act. § 41 Minnesota act, 1905. § 42 Philippine act. § 41 Massachusetts act.

¹⁰ First National Bank v. City, 192 Mass. 220; 78 N. E. Rep. 307 (1906).

¹¹ § 35 Minnesota act, 1905.

¹² §§ 43, 44 Illinois act. §§ 42, 43 Oregon act. §§ 40, 41 California act. § 136 Alberta act. §§ 147, 181 Saskatchewan act. § 115 Manitoba act. § 96 Queensland act. § 73 Victoria act. § 44 New South Wales act. § 80 South Australia act. § 67 Western Australia act.

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“certificate of title,” when used in a general sense, means the original register and the owner’s duplicate certificate. When the part retained by the registrar is intended, as distinguished from the part given to the owner, it is variously spoken of as the original certificate, the register and the folium of the register; and when the other part is intended—, the one which is given to the owner,— it is usually called the owner’s duplicate. When the context will apply equally well to either part, the term “certificate of title” may be used. When it is said that an intending purchaser may rely on the certificate of title, the register, the page of the register reserved for the particular land, is meant. The duplicate certificate may have been an exact copy of the register when it was executed, but involuntary liens may have been placed on the register subsequently, and may not have been noted on the duplicate certificate. A purchaser must examine the register, and may not rely on a duplicate certificate. In favor of a bona fide purchaser for value, the register is conclusively presumed to show everything which is subject to registration, but the statutory burdens which are not the subject of registration must be inquired into off the register.

§ 64. It is often said that the great object of the Torrens system is to produce a governmental register which may be relied on to set forth the condition of the title to an estate or interest in land, so that any person dealing with the land will take the registered title from the last registered owner, no matter what the true condition of the title may be. But this is not a statement of the whole scope of the system or of the only function of the register; it is merely a statement of one of the results, which follows from the terms of the statutes. The statute declares that every certificate is conclusive evidence of title. This statutory declaration is not limited in favor of a purchaser; and it makes no distinction between the first or original certificate, issued on the bringing of land under the act, and any certificate subsequently issued on a transfer of registered land. All certificates are evidence of an indefeasible title. When the registrar, under the provisions of the act, passes on the validity of a title submitted to him for regis-

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tration, he represents the state and passes on it once for all, and when he registers the title in the exercise of his functions, the statutory declaration of indefeasibility operates on the certificate of title, unless it falls within some of the recognized exceptions. When a first certificate has been issued, the holder takes the title, and the certificate may not be impeached for mere error of law, made by the registrar in passing on the validity of the title. When the registrar passes on the validity of a transfer of registered land, he exercises the same functions as in case of original registration, and his registration in succession to a former certificate may not be impeached for mere error of law.¹³ The great object of the system is, therefore, to create a certificate which is conclusive evidence of an indefeasible title to an estate or interest in registered land, and the register or certificate of title is the pivot on which the working of the Torrens system turns. Each section of a Torrens statute, and each point in a case arising under a Torrens act, has some connection with or relation to the certificate of title, and manifestly the subject of the certificate of title is too generic to be treated of in all of its ramifications. But it should be said here that, in order to be conclusive evidence of title, a certificate in succession to a former certificate must be issued on a transfer from the identical person who held the former certificate, and that the burden is on the intending purchaser to see that he deals with such person, and not with an imposter.¹⁴ While he need not search the title back of the last certificate, he must see that he deals with the person registered as owner in that certificate. This requirement is not contained in any Torrens statute, at least in a way to make it readily noticeable, and it was more than thirty years after the institution of the system before it was authoritatively laid down as a principle of title registration.¹⁵ Some twenty years after the passage of the original Torrens act it was held in South Australia that a first certificate, in the absence of any statutory exception, was conclusive evidence of title in favor of a first registered owner,¹⁶ but this doctrine

¹³ See post § 147 et seq.

C. 248, P. C.

¹⁴ See post § 129.

¹⁵ *Bonnin v. Andrews*, 12 S. A. L.

¹⁵ See *Gibbs v. Messer*, 1891 A. R. 153 (1878). See also *Coleman v.*

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was not generally accepted, and it was more than forty-five years after the passage of the original Torrens act before it was authoritatively settled that there was no difference between the indefeasibility of a title held under a first and under a subsequent certificate, and that, in the absence of some statutory exception, all certificates issued under an act were conclusive as evidence of title to the estate or interest registered in the registered owner.¹⁷ A mistake as to the boundaries of the land brought under the act can affect only the first certificate,¹⁸ and the rule, that an intending purchaser of registered land must deal with the last registered owner, can apply only to certificates issued subsequent to the first,¹⁹ but, with these exceptions, all certificates are on the same basis as to indefeasibility of title. Every certificate, whether first or subsequent, is conclusive, except, (1) where a certificate of an earlier date is in existence,²⁰ (2) where the land has been made, wholly or partially, the subject of certain errors,²¹ (3) and where the certificate has been obtained by the holder through fraud. A thorough understanding of the scheme and working of the system will be greatly impeded by the supposition that there is any distinction between the conclusiveness of a first certificate of title and one subsequently issued, or that the functions of the registrar are different when he makes an original registration and when he issues a certificate on a transfer of the title. The statutory declaration in all foreign acts, that every certificate, with certain exceptions, is conclusive evidence of title, is the very foundation of the Torrens system. If a certificate, which does not fall within one of these exceptions, is not evidence of an indefeasible title to the estate or interest registered, an examination of the whole chain of title should be made on each dealing with registered land, nothing is gained by title registration, and the scheme should be abolished. If in this country it is not competent for a legislature to declare that a certificate, made by a registrar, no matter

Riria Puwhanga, 4 N. Z. S. C. 230 (1886). *Hamilton v. Iredale*, 3 St. Rep. (N. S. W.) 535 (1903).

¹⁷ *Assets Company v. Mere Roihi*, 1905 A. C. 177, P. C. See post

§ 148.

¹⁸ See post, § 149 et seq.

¹⁹ See post, § 129.

²⁰ Post, § 153.

²¹ Post, § 147 et seq.

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how erroneous in the law arising on a question of title, is conclusive evidence of an indefeasible title as against all persons interested in the land, our Torrens statutes should be repealed at once. In this connection it must be remembered that a certificate signed by an administrative officer is not necessarily in and of itself conclusive evidence of the matters of fact and of law set forth and declared therein, and a legislature in this country may not enact a law making evidence conclusive which is not necessarily so in and of itself. In judicial investigations the law of the land requires an opportunity for a trial, and there can be no trial of rights in registered property if a registrar's certificate is conclusive evidence of ownership in all courts and in all places, and if only one party may produce his proofs. To preclude a party from going behind a certificate of title issued in this country, and from showing the truth concerning the condition of the title, would seem to be nothing short of invasion of the judicial province, of confiscation of property and of destruction of vested rights, without due process of law. It has been repeatedly held that in this country it is not within the legislative power to declare what shall be conclusive evidence.

State v. Beach, 147 Ind. 74; 46 N. E. Rep. 145; 36 L. R. A. 179 (1897). *State v. Buck*, 120 Mo. 479; 25 S. W. Rep. 573 (1893). *People v. Cannon*, 139 N. Y. 32; 34 N. E. Rep. 759 (1893). *Wantlan v. White*, 19 Ind. 470 (1862). *Felix v. Wallace Co.*, 62 Kan. 832; 62 Pac. Rep. 667 (1900). *Chicago Ry. Co. v. Minnesota*, 134 U. S. 418; 33 L. Ed. 970 (1889). *United States v. Klein*, 13 Wall. 128; 20 L. Ed. 519 (1871). *People v. Rose*, 207

Ill. 352, on p. 361; 69 N. E. Rep. 762 (1904). *Corbin v. Hill*, 21 Iowa 70 (1866). *White v. Flynn*, 23 Ind. 46 (1864). *Baart v. Martin*, 99 Minn. 204; 108 N. W. Rep. 915 (1906). *Meyer v. Berlandi*, 39 Minn. 438 (1888). *Missouri Ry. Co. v. Simonson*, 64 Kan. 802; 68 Pac. Rep. 653; 57 L. R. A. 765 (1902). *Farmers' Union v. Thresher*, 62 Cal. 407 (1882). *Cooley, Const. Lim.*, 5 Ed., 453-5. 3 Cyc. of Ev. 292. 8 Cyc. of Law, 820.

CHAPTER VIII.

Voluntary Dealings with Registered Land.

§ 65. Nature of the Functions of the Registrar. According to the general Torrens system, the purpose of the first registration of a title to an estate or interest in land is to present a certificate of an indefeasible title to it, so that the registered owner may hold the title as against all unregistered rights, which are the subject of registration, and so that an intending purchaser from him need make no inquiry into the title, except as to certain matters noted on the certificate and as to burdens enumerated in the statutes. Under the general real estate laws, and according to the recording system, on every dealing with land there must be, or at least usually is, an examination of the history and progress of the whole chain of title, but under the Torrens system, on an application for registration, an examination is made once for all on behalf of the state, and the result of the examination is registered on a certificate of title. Save as to certain well known statutory exceptions, this result, however correct or erroneous it may be, is declared by the state to be conclusive evidence of an indefeasible title to the registered estate in the registered owner. Since the title is so vested and declared in the registered owner by the acts of the registrar, he necessarily must have adjudicated on the rights of all persons interested in the land, and it follows that in passing on the sufficiency of the title and in registering it, he acts judicially. In passing on the sufficiency of the title and in registering it, the registrar acts judicially.

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When a deed for a transfer of the registered estate or interest in land is filed in the registrar's office, and the duplicate certificate of title is surrendered, the registrar examines the deed and the register of the title, which is to be affected by registration of the deed, determines the validity and effect of the deed, the right of the last registered owner to deal with the land as proposed, the right of the transferee to have the estate or interest transferred to him, and if he is satisfied that no other person can succeed against the transferee in an action of ejectment, and that the transfer should be made, he makes a registration of a new certificate accordingly. In foreign countries the functions of the registrar in making a new registration in succession to the last one, and in noting mortgages, leases and liens on certificates of title, are recognized as judicial. The nature of his functions is the same in making an original registration of a title and in making a registration in succession. In bringing land under the act he determines the validity and sufficiency of the whole chain of title as the basis for the certificate which he issues, and in making a registration in succession he determines the validity, force and effect of the deed of transfer under the last certificate, as the basis for the new certificate issued by him; and the difference in his duty is merely in the amount of labor performed and not in the character of the labor. Under all statutes the act of registration is the operative act to vest the title. In speaking of the functions of the registrar in making registrations under the Victorian act, it was said: "The intention of the legislature was obviously to impose the duty upon the registrar to prevent instruments being registered which, in law as well as in fact ought not to be registered in the first instance, and to determine the validity of instruments, as well as the priority of registration in point of time. He has therefore, to discharge not merely ministerial but judicial duties."¹ Recently it has been held that where a registrar is vested with a discretion in passing on matters which come before him under the provisions of an act, he must be judicially satis-

¹ *Ex parte Bond*, 6 V. L. R. L. v. *Hassett*, 1907, V. L. R. 404; 28 A. 458 (1880). See *National Company* L. T. 232.

fied and act accordingly, and the court will not interfere with his decision and compel him to act in a certain way.² Under the English act the registrar acts as a judge in the performance of his duties with respect to registration.³ In clerical matters, as, for instance, in writing out descriptions of land, names of persons, duplicate certificates, affixing his seal, or his initials, etc.,—he acts in an administrative capacity; but within a limited sphere,—in performing any act which may result in divesting, transferring or fixing the rights of persons in land,—in carrying out the elemental features of the system,—he performs judicial functions.

§ 66. There seems to be an analogy between a registrar under foreign acts and a judge of a court, who is also clerk of his court; a distinction must be made between the acts which he performs in his clerical and ministerial capacity, and those which he performs in his judicial capacity. The statutes declare that certificates issued by him shall be conclusive evidence of title. Thus, the state by statutory declaration vests rights and titles through certificates issued by him. There is no distinction between the first certificate and any one issued subsequently, but there is this qualification on the conclusiveness of a subsequent certificate, that the person registered under it must have taken a transfer of the estate or interest from the last registered owner. Though he has power to summon persons before him in many cases, and to determine many matters of administration under the acts, the registrar is not a judge of a court. Under most Torrens statutes, controverted questions of law and fact, arising on an application for original registration, must be referred by him to a court competent to adjudicate upon all the rights of the parties interested. He is not authorized to inquire into conflicting equities arising between persons, which may arise from or grow out of his acts of registration, or to determine controverted questions of fact concerning alleged errors in a registration; ordinary suits and proceedings in court must be instituted in order to litigate such questions.⁴ But he is authorized to pass on all

² *Ex parte Gallagher*, 8 S. R. (N. S. W.) 230; 25 W. N. 54 (1908).

³ *Attorney General v. Odell*, 2 Chan. Div. 47 (1906).

⁴ *Barham v. Hoggins*, 6 Tas. L. R. 6 (1910). *In re Stanley* 24 W. N. (N. S. W.) 74 (1907).

questions of law arising in an abstract of title submitted to him on an application to register the land, or arising on the construction of an instrument of transfer of registered land. Where a registration is not contested under a caveat, he sees that all things are done in accordance with the terms of the act, exercises his judgment and discretion on behalf of the state, in order to effectuate the purposes of the statutes, and in making a registration, whether first or subsequent, acts judicially. In case of doubt in his own mind on a question of law arising on any proposed registration, he may refer the question to the court, but he may not be compelled to do so. When he decides a question of law arising on any proposed registration, an appeal lies from his decision. His main function is to make and keep the register of titles, and, in all matters directly leading up to the act of registration, he acts as a judge. When he has registered his decision on a title or on a transfer of registered land, the statute declares the certificate issued by him to be conclusive evidence of an indefeasible title. It is the essence of the Torrens system that his decision as registered in a certificate of title shall be binding on all persons interested in the land, whether they have been notified of the proposed registration or not. If, in passing on questions of title and in performing his duties with respect to registration, his acts are not binding on every person who may be interested therein, and if an action may be prosecuted to correct or annul his act and to compel him to act in a certain way, the system is one of judicial registration, and not the Torrens system of registering indefeasible titles. With respect to the functions of the registrar in making new registrations on transfers of registered land, it is to be noted that the terms of the acts in this country are substantially the same as the terms of all the foreign acts. They seem to carry out the same scheme and design. His functions in making such new registrations under the acts in this country have been challenged as judicial and beyond the powers of a ministerial officer. No case has been decided in this country, in which some specific act of a registrar was challenged as judicial, but the supreme courts of several states, in suits involving the constitutionality of certain registration acts as a whole,

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have passed generally on the nature of the functions of registrars under them.

§ 67. Nature of Registrar's Functions in This Country. The first decision on the subject was in Ohio, where the supreme court said:

“Recurring to the duties of the recorder under the act, he is not merely to enter the evidence furnished by the agreement of the parties that a lien has been discharged, or that it has become void by the lapse of time, or that a mistake has intervened touching their rights; but he is to apply the rules of evidence to the ascertainment of disputed facts, to apply the rules of law concerning payment, to interpret and apply the statute of limitations as it may affect the enforcement of liens, including such questions of disability as may arise, to decide the questions of fact and law that may arise in determining whether mistakes have intervened, and who are bona fide purchasers; and then to make an entry which is to the same effect in concluding the rights of the adversary parties as would a decree in equity. That these are judicial powers is entirely clear. They seem to have been so regarded by the general assembly, for there is a provision for appeal from the decisions of the recorder. This is not supposed to include all the judicial powers which the act assumes to confer on the recorder, but it is sufficient for present purposes. Nor is this objection to the act avoided by the provisions which contemplate a review of or appeal from the action of the recorder. It would, perhaps, be found upon a careful consideration of his powers, that they are not all embraced within the provisions for review or appeal. But the assumption that they are so embraced would not validate the act in this respect. The recorder as a ministerial officer is incompetent to receive a grant of judicial power from the legislature. His acts in the attempted exercise of such powers are necessarily nullities. They cannot be effective to impose any obligation or burden upon any citizen, or to deprive him of any right. The act plainly contemplates that the person against whom the recorder decides in the exercise of any of the powers sought to be conferred must either submit to the adverse decision or take upon himself the burden of an appeal. In view of the constitutional provision on the subject, he cannot be forced to this alternative. If these are judicial powers, it is admitted that they cannot be vested in the recorder. If they are not judicial, the provisions for an appeal are void, since, as was said by this court,⁵ we have no idea of an appeal,

⁵ Logan Branch Bank, ex parte, 1 Oh. St. 432.

except from one court to another.’’⁶

§ 68. Issuing a New Certificate Is Not Necessarily a Judicial Act. The supreme court of Illinois passed on sections 40, 60, 68 and 69 of the Illinois act, relating to the transfer of land after registration, and to the registering of liens and claims, and held that these sections did not confer strictly judicial power upon the registrar, and that the discretionary power which he might exercise under those sections was only quasi judicial and incidental to the proper performance of his ministerial duties.⁷ In discussing these sections, the court said:

“It is first insisted that the act confers judicial powers upon the registrar of titles, or upon him and the examiners of titles, in violation of the constitution of this state. A somewhat similar act passed in 1895 was held invalid on that ground in *People v. Chase*.⁸ By the provisions of the law of 1895 the registrar was clothed with power to determine the ownership of land when application was made for the initial registration thereof, and to issue his certificate accordingly. The present act provides that the ownership shall be determined by a decree in equity entered in a court of competent jurisdiction, upon which decree the registrar shall issue the first certificate of registration. In this regard his duties under the present law are clearly ministerial only, and the fatal objection to the former act is therefore removed. But it is insisted that the law is still vulnerable, in that it vests judicial power in the registrar in the performance of his duties as to subsequent registrations. Waiving the question whether this would, if true, necessarily vitiate the whole act, is the position tenable? Like a mere recorder, the registrar is required to file all deeds, mortgages, leases and other instruments affecting the title to land, and make proper notations upon the instruments and upon the record. He is to keep a record to be known as the ‘Register of Titles,’ in which must be entered the original and all subsequent certificates of title, and such notations as to liens, incumbrances and the like as are requisite to show the true condition of the title. When any instrument is filed with him which is intended to create a charge, lien or incumbrance upon land, it is made his duty, by section 60, to enter a memorial upon the register and also upon the original certificate. Thus far his duties are clearly and simply ministerial. But it is contended this section 60

⁶ *State v. Guilbert*, 56 Ohio St. 175; 44 L. R. A. 801 (1898).
⁵ 75; 47 N. E. Rep. 551 (1897).

⁷ *People v. Simon*, 176 Ill. 165; 8 165 Ill. 527; 46 N. E. Rep. 454 (1897).
⁸ 52 N. E. Rep. 910; 68 Am. St. Rep.

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authorizes him to determine the validity of liens, incumbrances or charges, and the argument is, that this is an exercise of judicial power, which, under our constitution, can be conferred upon no officer or tribunal save those which belong to the judicial department. The language of the section applicable to this question is as follows: 'It appearing to the registrar that the person intending to create the charge has the title and right to create such charge, and that the person in whose favor the same is sought to be created is entitled by the terms of this act to have the same registered, he shall enter upon the proper folium of the register, and also upon the owner's certificate, a memorial of the purport thereof,' etc. It will be noticed that the provisions in case of a transfer of the property are substantially the same. Section 47 says: 'Upon its being made to appear to the registrar that the transferee (evidently intending transferrer) has the title or estate proposed to be transferred and is entitled to make the conveyance, and that the transferee has the right to have such estate or interest transferred to him, he shall make out and register as hereinbefore provided, a new certificate,' etc. Article 3 of the constitution of 1870 reads as follows: 'The powers of the government of this State are divided into three distinct departments,—the legislative, executive and judicial; and no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.'⁹ The question therefore is, can the legislature devolve the duties named, upon an officer not a member of the judicial department? That the duties mentioned are judicial in their nature may be admitted, but it does not necessarily follow that their exercise is prohibited by the constitutional provision to all but officers belonging to the judicial department. Numerous instances may be cited, as is done in *Owners of Lands v. People*,¹⁰ where executive and legislative officers are authorized to exercise powers which in a sense are judicial, and the laws imposing such duties held not to be in violation of the constitutional provision quoted. These duties or powers are generally and properly termed 'quasi judicial,' to distinguish them from those which are judicial in the sense of belonging to the judicial department exclusively. In theory all governmental power is divided into the three named divisions, and upon a casual consideration the division would seem to present no difficulty, but in the practical application of the principles involved, courts have been compelled to observe that the line of demarkation between

⁹ Rev. Stat. p. 60.

People v. Chase, supra.)

¹⁰ 113 Ill. 296 (referred to in

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the exclusive powers of the three departments is far from clear.¹¹ Judge Cooley, in his work on Constitutional Limitations on the Legislative Branch of the Government, has given a definition of 'judicial power.' It is this: 'The power which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the laws.' As a general definition of the functions of the judicial department it is sufficiently accurate, and we adopted it in the case of *People v. Chase*, *supra*. We then thought, and are of the opinion still, that it was applicable to that case, the functions of the registrar, under the act of 1895, being not quasi judicial, merely, but strictly so, and such as are usually exercised by the courts alone, constituting the exercise of judicial power within the constitutional prohibition. Under the present act his duties more nearly resemble those frequently exercised by members of the executive department. The definition given by Judge Cooley does not attempt to mark the line between those quasi judicial functions which may be vested elsewhere, and those strictly judicial, which can be reposed nowhere save in the courts, and for that reason it cannot be properly adopted in this case. As we said in another case: 'It may in many cases be a matter of difficulty to determine the precise line which divides the executive and judicial functions. It has been said that where the functionary hears, considers and determines, then he performs judicial acts. This definition is not strictly accurate. * * * * It embraces cases that are not judicial, and hence is too comprehensive.'¹² And appreciating the difficulty of defining the limits of the several departments of government we also said in an earlier case: 'Nevertheless, when we come to apply them to actual controversies growing out of the varied relations which the citizens sustain to the State and to one another, we encounter doubts and difficulties of the gravest character. Just where the dividing line is to be drawn between judicial and legislative power, with respect to certain subjects, often presents questions about which enlightened courts and eminent jurists widely differ. So while the powers of courts seem so very simple and clearly defined, yet in the application of them to actual cases, their proper limits are often difficult to determine.'¹³ Also: 'The first and second sections of the first article of the constitution (of 1818) divide the powers of governments into three departments,—the legislative, executive and judicial,—and declare that neither of these departments shall exercise any of the powers properly

¹¹ 6 Am. & Eng. Ency. of Law Ill. 94, on p. 108.
2d ed. p. 1007.

¹² *Donahue v. Will County*, 100 Ill. 338 on p. 357.

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belonging to either of the others, except as expressly permitted. This is a declaration of a fundamental principle, and, although one of vital importance, it is to be understood in a limited and qualified sense. It does not mean that the legislative, executive and judicial power should be kept so entirely distinct and separate as to have no connection or dependence, the one upon the other; but its true meaning, both in theory and practice, is, that the whole power of two or more of these departments shall not be lodged in the same hands, whether of one or many.¹⁴ Judge Story, in his work on the Constitution, says: 'But when we speak of a separation of the three great departments of government, and maintain that their separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly separate and distinct and have no common link of connection or dependence, one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments, and that such exercise of the whole would subvert the principles of a free constitution.'¹⁵ 'Notwithstanding the memorable terms in which this maxim of a division of powers is incorporated into the bills of rights of many of our state constitutions, the same mixture will be found provided for, and, indeed, required, in the same solemn instruments of government. * * * Indeed, there is not a single constitution of any state in the Union which does not practically embrace some acknowledgment of the maxim and at the same time some admixture of powers constituting an exception to it.'¹⁶ In the case of *Murray's Lessee v. Hoboken Land and Improvement Co.*,¹⁷ in discussing whether the issuing of a distress warrant by the solicitor of the treasury was the exercise of executive or of judicial power, the supreme court of the United States says: 'It is not sufficient to bring such matters under the judicial power that they involve the exercise of judgment upon law and fact. * * * That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties, the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. * * * We do not doubt the power of Congress to provide by law that such a question shall form the subject matter of a suit in which the judicial power can

¹⁴ *Field v. People*, 2 Scam. 79, on p. 83.

sec. 525.

¹⁵ 1 Story on the Const. 5th ed.

¹⁶ *Ibid.* sec. 527 p. 395.

¹⁷ 18 How. 272.

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be exerted. The act of 1820 makes such a provision for reviewing the accounting officers of the treasury, but until it is reviewed, it is final and binding; and the question is, whether its subject matter is necessarily, and without regard to the consent of Congress, a judicial controversy, and we are of the opinion it is not.' From these authorities it is apparent that the mere fact that the registrar is required by this act to inquire into the existence of certain facts and to apply the law thereto, in order to determine what his official conduct shall be, and that his action may affect private rights, does not constitute the exercise of judicial power, strictly speaking. It is not the intention of these two sections (60 and 47) to provide a tribunal for the adjudication of disputes concerning land titles. The primary purpose is the issuing of the certificate, and the exercise of the judgment of the registrar is incidental. The prohibition in question 'has never been held to apply to those cases where judgment is exercised as incident to the execution of a ministerial power.'¹⁸ The powers exercised by the registrar under this law are analogous to those exercised by the commissioner of patents. A power of decision is given to that officer in many matters, not only between the government and the patentee, but also between different claimants, as to priority, patentability and like matters, and in the performance of these duties it has never been considered that he was encroaching upon the judicial domain. They are also, in a measure, like the duties performed by officers of the land office. Duties of a similar nature, involving judgment or discretion and the application of the law to the facts, are devolved both under the state and federal laws upon many other executive officers, legally. In some instances it is even held that in the exercise of such judgment the officer is free from judicial interference. But in the case of the registrar this act provides that any person feeling himself aggrieved by the act or neglect of this officer, in any matter pertaining to the duties required of him, may file a petition in equity in the proper court, making the registrar and other persons interested parties defendant, and that the court may proceed therein as in other cases in equity, and may make such order or decree as shall be according to equity in the premises and the purpose of the act. This, with the well-known jurisdiction of the courts in mandamus, injunction, rescission, cancellation, bills of relief, and the like, will effectually protect the citizen against any arbitrary conduct on the part of the officer. Recurring to the duties of the registrar, we find that in case of a tax sale or judgment, or

¹⁸ Owners of Lands v. People, *supra*.

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levy under an attachment or execution, or in case of a mechanic's lien, the registrar, upon the filing of the proper certificate, enters a memorial thereof upon his record, and in case the lien ripens into a title the former certificate of title is canceled and a new one issued to the proper party. These duties do not differ in character from those already mentioned, and what has been said is equally applicable thereto also."¹⁹

§ 69. In the California case it was argued that the registrar was required by the act to pass on deeds, mortgages, trusts, powers, etc., and to adjudicate upon the rights of persons under them. In passing on the nature and scope of the duties of the registrar, the court said:

"The point is that the registrar is required to determine the legal effect of these instruments, and that this is a judicial function which can be given only to a judicial officer. There is no force to the objection. Every administrative officer is frequently called upon, in the discharge of his duties, to decide questions of law relating thereto. The recorder is required to determine whether an instrument presented for record is a deed, a mortgage, a lease, a notice of action, or what not, so as to record it in its proper book. The sheriff must often determine, for his own guidance in making a levy, the ownership of property. The clerk must determine the nature and legal effect of papers filed with him, and perform the appropriate duty respecting them. The duties required of the registrar by these sections are of the same nature. His decision in the matter is not conclusive. If he decides wrongfully and refuses to perform the appropriate duty in the premises, he may be compelled to act properly by means of a writ of mandamus, the same as any other ministerial officer who mistakes his duty under the law and refuses to perform it. The exercise of such powers by ministerial officers is a necessary function of the executive department, and although it may require similar deliberation to that involved in the exercise of judicial power, the bestowal of such powers upon the executive department does not violate the provisions of the constitution forbidding that department to exercise the functions of any other department."²⁰

In discussing the nature of the duties of the registrar, as set forth in the act, the supreme court of Massachusetts said:

"The other objection to the constitutionality of the statute is with regard to the powers and duties of the recorder and

¹⁹ *People v. Simon*, supra.

²⁰ *Robinson v. Kerrigan*, 151 Cal. 40; 90 Pac. Rep. 129 (1907) Citing *People v. Simon*, 176 Ill. 165; 52 N.

E. Rep. 910; 68 Am. St. Rep. 175. *Owners v. People*, 113 Ill. 296. 1 Story on Constitution, 5th ed., sec. 525.

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assistant recorder. It is said that they are given judicial powers after the original registration, although not judicial officers under the constitution. The act of registration is the operative act to convey title,²¹ and by the act of 1898 the assistant recorder does it, unless in doubt.²² It is said that, as his decision affects title, it must be judicial. But here again it is necessary to use a certain largeness in interpreting broad constitutional provisions. The ordinary business of registration is very nearly ministerial. There is no question to be raised, or which can be raised. If there is a question, either raised by any party in interest or occurring to the assistant recorder, it is to be referred to the judge for decision.²³ But whatever may be thought of the original act, by amendment even the ordinary business is to be done only in accordance with the rules and instructions of the court.²⁴ Under this amendment registration is the act of the court. The fact that it may be done by the assistant recorder under general orders, when there is no question, is not different from the power of the clerk to enter judgment in cases ripe for judgment under a general order or rule of the superior court. It should be observed that by section 55 the production of the owner's duplicate certificate, whenever any voluntary instrument is presented for registration, is conclusive authority from the registered owner for the entry of a new certificate or the making of a memorandum of registration, and that a registration procured by presenting a forged certificate etc., is void. * * * The act shows throughout the intent that no one shall be concluded without having a chance to be heard, and although some of its methods are new to this commonwealth, we cannot say that the precautions as to notice are insufficient in substance or form.²⁵

§ 70. When Registrar is in Doubt. Under several acts, questions arising before the registrar upon an application for registration, or as to any dealing with a registered title, whether they relate to the construction, effect or validity of any instrument, or to the nature or extent of interests or powers, or to the mode in which any entry should be made, may be determined by the registrar, or may be referred by him at once to the court for decision.²⁶ Some acts provide that

²¹ § 50.

²² §§ 53, 55, 57, 58, 61, 62, 63.

²³ § 53.

²⁴ Statutes, 1899, c. 131, § 8

²⁵ Tyler v. Judges, 175 Mass. 71;

55 N. E. Rep. 812; 51 L. R. A. 433 (1900). State v. Westfall, 85 Minn.

437; 89 N. W. Rep. 175; 54 Cent. L. J. 282 (1902). People v. Crissman, 41 Colo. 450; 92 Pac. Rep. 949 (1907).

²⁶ Rule 297 English act. See also § 158 Saskatchewan act. § 113 Alberta act. §§ 90, 91 British Colum-

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whenever any question shall arise with regard to the performance of any duty or the exercise of any function conferred or imposed on him by the act, the registrar may state a case for the opinion of the supreme court, and the decision of the court is binding on him.²⁷ There is nothing in these sections to indicate that any party in interest, when in doubt, may refer the matter to the court, and the fact that the statute says that a registrar may refer a matter to the court, when in doubt, does not give an interested party the right to pass over the head of the registrar and make a direct application to the court for action.²⁸ In some of the acts in this country it is provided that when the registrar is in doubt on any question, it may be referred to the court for decision, on the certificate of the registrar, stating it; and that the court, after notice to all parties and a hearing, shall enter an order prescribing the form of memorandum to the registrar, who shall make registration in accordance therewith.²⁹ The acts of Illinois, Oregon, Minnesota and California do not provide for a reference to the court in case the registrar is in doubt as to the proper entry to be made in a registration.

§ 71. When Parties Do Not Agree on Registration. Whenever an interested person raises a question with regard to the performance of any duty, or the exercise of any function, of the registrar, he may state a case for the opinion of the supreme court, and its decision shall bind him.³⁰ Some acts in this country provide that if any party in interest does not agree as to the proper memorandum to be made in pursuance of any deed, mortgage or other voluntary instrument presented for registration, the matter shall be referred to the court for decision, upon the suggestion in writing of any party in interest; and the court, after notice to all parties and a hearing, shall enter an order prescribing the form of memo-

bia act. § 93 Ontario act. § 21 Nova Scotia act. § 97 Fiji Ordinance, 1876. § 14 Act for Ireland, 1891.

²⁷ § 199 Victoria act. § 193 Western Australia act. § 123 New South Wales act. § 195 New Zealand act. § 223 South Australia act. § 111 Tasmania act.

²⁸ In re Smith, 1 Sask. 126

(1908).

²⁹ § 52 Massachusetts act. § 53 Hawaiian act. § 53 Philippine act. § 54 New York act. § 48 Washington act. § 49 Colorado act.

³⁰ § 199 Victorian act. § 193 Western Australia act. § 123 New South Wales act. § 195 New Zealand act. § 223 South Australia act. § 111 Tasmania act.

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randum to the registrar, who shall make registration in accordance therewith.³¹ It is to be noted that according to these acts the disagreement must arise concerning some voluntary instrument, but under other acts a reference to the court may be made when any party does not agree as to the proper entry to be made on the filing of any instrument, voluntary or involuntary.³² Under all these sections the duty is imposed on the registrar to decide what entry shall be made in the case before him, and the registration will be made according to his decision, unless a reference to the court is made by some party in interest. But in New York it is provided that when a deed or other instrument is filed in the office of the registrar, and the duplicate certificate is surrendered to him, if the interested parties agree in a statement as to the nature and effect of the transfer, the registrar shall enter such statement as a memorial upon the original certificate, make out and register a new certificate, and issue an owner's duplicate. If the parties fail to agree upon the statement to be entered on the certificates, the registrar shall refuse to make a transfer until directed by the court.³³ Under this section the agreement of the parties on the construction to be given to an instrument of transfer, and not the judgment of the registrar thereon, is the basis of a new registration. He is required to perform a mere clerical duty in entering such a registration as may be agreed upon by the parties or as may be directed by the court. The acts of Illinois, Oregon, Minnesota and California do not provide for a reference to the court in case the parties do not agree on the proper entry to be made on the register, but, as will be seen in the next section, in Illinois, Oregon and California, there is a provision for an appeal to court by any person who is aggrieved by any decision or act of the registrar. In Minnesota, however, there is no provision either for a reference to the court in case of a disagreement as to the proper entry to be made, or for an appeal after the entry is made.

§ 72. Person Aggrieved By Action of Registrar. Any per-

³¹ § 52 Massachusetts act. § 53
Hawaiian act. § 53 Philippine act.
§ 54 New York act.

³² § 48 Washington act. § 49
Colorado act.
³³ § 38 New York act.

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son feeling himself aggrieved by the action of the registrar, or by his refusal to act in any matter involving his duties or functions under the act, may file his petition, bill or complaint in a court of competent jurisdiction, making the registrar and other persons, whose interests may be affected, parties defendant, and the court may proceed as in other cases, and may make such order or decree as shall be according to equity and the purport of the act.³⁴ The Illinois act provides that he may file his petition in court in the proceeding in which the land was registered, or that he may file an original bill in equity in any court of competent jurisdiction.³⁵ The other acts in this country do not provide for a reference to the court in case a person feels himself aggrieved by any act of the registrar. In the case of *State v. Guilbert*,³⁶ this provision was adversely commented on, and it was held that if the powers of the registrar were judicial, the whole scheme of the act was unconstitutional and void, and if his powers were not judicial, the provision for an appeal from his decision was void. It is common to provide for appeals to the court from the decisions of persons in the executive branch of the government, as, for instance, from the decisions of appraisers of customs or of assessors of property for taxation; but such officers are governmental agencies and are connected with the governmental revenues. It may be that it is competent for the legislature to provide for an appeal to the court from the decision of a person who represents the state in vesting titles to real estate. Perhaps such a procedure as that under consideration may be sustained, not as an appeal, but as a proceeding in the nature of an application for a mandamus to the registrar to perform his supposed duty in the premises under the act. This suggestion as to the nature of the proceeding was made in Australia in an early case,³⁷ but in a later case it was said that such a procedure did not require any writ in the nature of a mandamus.³⁸ Under foreign acts,

³⁴ § 33 California act. § 94 Illinois act. § 93 Oregon act. § 89 British Columbia act. § 96 Fiji Ordinance 1876. § 121 New South Wales act. § 14 Act for Ireland, 1891. § 298 English rules 1908.

³⁵ § 94 as amended in 1907.

³⁶ 56 Ohio St. 575; 47 N. E. Rep. 551 (1897).

³⁷ *Fitzgerald v. Archer*, 1 W. W. & a'B. (L.) 40 (1864).

³⁸ *Ex parte Patterson*, 4 A. J. R. 26 (1873).

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where the registrar is a judicial officer, it is certainly proper to provide for an appeal from his decision on questions of title and of administration under the act; and if it is not competent in this country to provide for an appeal from the acts and decisions of the registrar as a ministerial officer, the expense and delay of independent suits to correct supposed errors will interfere with the smooth working of the system. All the provisions which we have been considering for references of matters to the court give to the acts a certain finish and a color of fairness, but the expense and delay of such references inevitably must be considerable. Some Canadian acts provide that if any person is dissatisfied with any act, decision or order of the registrar, he may apply to the judge by petition, setting forth the grounds of his dissatisfaction, and the judge shall determine the matter in controversy.³⁹ Any person feeling himself aggrieved by any act or refusal to act on the part of the registrar may petition the court to require him to perform his duty.⁴⁰ In Ontario an appeal to the court lies from any act, order or decision of the master of titles.⁴¹

§ 73. Act of Registration is the Operative Act. Under the Torrens system the transfer of an interest in land is made by registering the ownership of it in a public office, instead of by the execution and delivery of an instrument. It is made by registering the evidence of the title and not the evidence of the deed. Registration takes the place of the feudal fiction or ceremony of seizin, and no formal delivery of an instrument of transfer is necessary. It is the one thing which makes valid any instrument relating to registered land, and which gives completeness and validity to a transaction relating to it. Under this system, the registered estate, which is the equivalent of the legal and equitable estate under the general laws, is the only estate in land, and it is manifest that the registered estate does not pass or vest unless and until the instrument of transfer is registered. It is an elementary and essential fea-

³⁹ § 158 Saskatchewan act. §§ 83, 89 British Columbia act. § 112 Alberta act. § 121 Manitoba act. § 25 Nova Scotia act.

⁴⁰ § 96 English act, 1875. § 209 Victorian act. § 121 New South

Wales act. § 191 New Zealand act. § 221 South Australia act. § 203 Western Australia act.

⁴¹ § 157 Ontario act. See also rule 88.

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ture of this system of registering titles that no voluntary instrument relating to land, and no judgment, execution, attachment or other adversary proceeding, shall take effect as a conveyance, or bind or affect the land. They operate only as a contract between the parties and as evidence of authority to the registrar to make a proper registration. The act of registration is the operative act to affect the title to an estate or interest in land. It vests the registered title in the registered owner,⁴² and *ex propria vigore* divests any outstanding unregistered estate or interest in the land from any other person, in order to transfer and vest it in the registered owner of the title. For centuries land was conveyed by the act of the owner, and the efficacy of a deed depended on the validity of the title of the grantor, but under the Torrens system titles are vested by the state by the act of registration and through the functions of the registrar, and a transfer does not depend in the least on the validity of the title of the transferror. A registered owner may hold a certificate which is void for forgery,⁴³ and yet a bona fide transferee for value from him will take a good and valid title to the land as soon as he is registered. If such a transferee takes a good and valid title through a transferror whose title is invalid, it is evident that the transfer, vesting and affecting of the title is effected by the power of the state through its statutory declaration of conclusiveness of the certificate, and is not done by virtue of any estate or interest in the registered owner. While the effect of a new registration does not depend on the estate or interest in the land, which is held by the last registered owner, yet the new registration, in order to be effective, must be made under a valid transfer from the last registered owner. The technical rule of the system, concerning registration of a new owner in succession to a former registered owner, therefore,

42 § 44 Washington act. § 45 Minnesota act. § 38 New York act. § 49 Massachusetts act. § 50 Hawaiian act. § 50 Philippine act. § 54 Illinois act. § 53 Oregon act. § 45 Colorado act. § 55 California act. §§ 63, 92 Victorian act. § 58 Western Australia act. § 43 Queensland act. § 57 South Australia act. § 36 New South

Wales act. § 36 New Zealand act. § 39 Tasmania act. § 39 Fiji Ordinance, 1876. §§ 29-49 English act, 1875. § 41 Ontario act. §§ 53, 74 British Columbia act. § 83 Manitoba act. §§ 43, 52 Nova Scotia act. §§ 41, 46 Alberta act. §§ 73, 80 Saskatchewan act. § 35 act for Ireland, 1891.

43 Post, § 127.

is that registration under a transfer from the last registered owner is the operative act to vest the title as registered in the new owner.⁴⁴

§ 74. Registration is Not an Operative Act in This Country.

It is easy to catch a phrase and use it without realizing its full meaning. The supreme court of Massachusetts in the Tyler case said: "The act of registration is the operative act to convey title, and by the act of 1898 the assistant recorder does it, unless in doubt." It is easy to accept the proposition, that registration is the operative act to affect a title, to transfer the title, and to vest in the registered owner an indefeasible title to the estate or interest with which he is registered, without comprehending the corollary which naturally follows over and above it. Where the mere act of registration transfers and vests the title in accordance with the terms of the certificate of title, a registration, when erroneous as to a matter of law arising in the title, must divest the title, or some part of it, from the real owner, in order to transfer it to and vest it in the person registered as owner. If the act of registration transfers an indefeasible title to the new registered owner only when the transferrer has such a title, and only when the instrument of transfer is sufficient for that purpose, the act of registration is not an operative act, effecting the transfer and vesting of the title *ex propria vigore*, but is a mere record of the legal effect of the links in the chain of the title. If registration evidences an indefeasible title only when the title is in fact indefeasible, there is nothing in the system which is not in any other system wherein titles are deraigned from their sources. There are indefeasible titles under every recognized system of conveyancing, but the distinctive feature of a true Torrens system is that the state indisputably declares the title to be unimpeachable just as it is registered, whether in fact it is so, or not. Here is the crux of the American Torrens system. If the mere presentation of an instrument of transfer of registered land to the registrar, to be acted on by him under his powers as contained in the statutes, does not confer upon him the jurisdiction to make a new registration according to his judgment, without any necessary notice

⁴⁴ § 129, post.

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to persons who may have rights under the instrument, and without any necessary opportunity on their part to be heard, and if the act of the registrar in making the new registration and the statutory declaration of indisputable title cannot divest from the real owner any interest or estate which may be in him, and vest it in the registered owner, then the act of registration is not an operative act to transfer, vest or affect the title, and the system cannot be worked under our laws. So far our courts have declared against the binding force of the act of registration in this country.⁴⁵ The supreme court of Ohio in the Guilbert case held that no act of the registrar could deprive a person of any right in land, or be effective to impose any obligation or burden on him; other courts have merely held that his acts do not conclude any interested person; and the supreme court of Illinois has held that his acts are merely *prima facie* evidence of their correctness, and may be impeached in any proper litigation.⁴⁶ This merely means that an officer will be presumed to have performed his duty, and that the burden of proof is on the attacking party, according to the usual rule in litigated cases. The Ohio court merely meant that an interested person could not be forced by statute to appeal from the decision of a non-judicial officer, who assumed to pass on his rights, but that he might assert his rights by an independent action to enforce and declare them. All the cases in this country agree that the acts of the registrar conclude no one, and the logic of them all is that under our system the act of registration is not an operative act to transfer, vest and affect the title.

§ 75. Concerning Registration. The first case determined by the court of appeal in England, construing any of the provisions of its land transfer acts, and discussing the principles of the Torrens system, held that there was nothing in the English acts to prevent the passing of the legal estate in land by an ordinary mortgage deed executed by the owner in fee, whether he is registered or not at the time of the execution of the deed; that, after land has been placed on the register, the title will pass by an unregistered deed, subject to the risk of the grantee

⁴⁵ Ante, § 68, post § 167.

⁴⁶ *State v. Illinois Central*, 246

Ill. 188; 92 N. E. Rep. 814 (1910), citing *People v. Simon* supra.

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having his title defeated by an exercise of the statutory power of disposition given to the registered owner; that he merely assumes that risk in dealing off the register; but that the grantee may protect himself against that risk by procuring an entry to be made on the register.⁴⁷ As a statement of the general principle, that one who is not himself registered as owner may convey by his deed the legal estate to registered land, this decision seems to undermine the Torrens system at its most vital point. It tends to confuse our ideas concerning the rule that dealings with registered lands must be only with registered owners, and concerning the theory of a single registered estate in land, vested by the power of the state on registration by the proper officer. In some acts it is provided that every instrument, until registered, shall be deemed to confer upon the person taking under it a right or claim to registration,⁴⁸ but the instrument must have been executed by a registered owner, and all that the purchaser gets is a right or claim against the land, and not an estate. It has been held that although a transfer from a registered owner, which has not been registered, is ineffectual to pass the title to land, yet it is effectual to pass an equitable right to set aside a certificate of title relating thereto, which had been obtained by fraud, and which prevents the registration of the transfer. But here also the transfer must have been executed by a registered owner, and all that the transferee gets is an equitable right.⁴⁹ The general doctrine is that an unregistered transferee of an estate or interest in land, taking from a registered owner, has certain rights to registration which he may enforce, but he is not the owner of the estate or interest, and is not entitled to be treated as such.⁵⁰ An unregistered statutory instrument of transfer, executed by a regis-

⁴⁷ *Capital and Counties Bank v. Rhodes*, 1 Chan. 631 (1903). It must be said, however, that the court was construing § 49 English act, 1875, and that this section would spoil the symmetry of any system of title registration. See *Entwistle v. Lenz*, 14 British Col. Reps., 51 (1908).

⁴⁸ § 90 Manitoba act. §§ 48, 49 Queensland act, 1877. § 71 Ontario

act. § 74 British Columbia act.

⁴⁹ *McEllister v. Biggs*, L. R. A. C. 314 (1883), P. C., on appeal from the supreme court of South Australia. See also *Butters v. Blacker*, 21 S. A. L. R. 37 (1887). *Trantor v. Lord*, 8 S. A. L. R. 81 (1874). *Gibbs v. Messer*, 1891 A. C. 248, P. C.

⁵⁰ *Ex parte Davies*, 11 V. L. R. 780 (1885).

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tered owner, operates only as a contract between the parties to the instrument, and may be enforced as between them where no rights of third persons have intervened.⁵¹ In April, 1907, execution creditors registered their judgment against the lands registered in the name of their judgment debtor, pursuant to an act declaring that a registered judgment shall form a lien and charge on the lands of the debtor. Previous to this, in January, 1906, the debtor had transferred a certain lot described in his certificate to a person who, through ignorance of the land registry laws, neglected to register his transfer until August, 1907, when he found this judgment registered against the lot. Section 74 of the land registry act provided that no instrument should pass any estate or interest, either in law or equity, to land until it was registered in compliance with the provisions of the act. The transferee brought suit to set aside the cloud of this judgment. In construing these provisions of the two acts, the court below held that section 74 governed, since it made registration of transfers a sine qua non to the passing of any title to land, whether at law or in equity. But on appeal it was held that the judgment act gives the judgment creditor only a right to register against the interest in lands possessed by the judgment debtor; and that in this case the debtor, having conveyed the land to plaintiff so long before the execution creditors' judgment was obtained, was a dry trustee of the land for plaintiff.⁵² Notwithstanding section 74 of the land registry act of British Columbia, providing that no interest in land shall pass until the instrument of transfer is registered, an unregistered deed confers a good title upon the transferee as against a registered assignment for the benefit of the creditors of the transferor, if the transferee, or some one claiming under him, subsequently effects registration. Such registration relates back to the delivery of the instrument.⁵³ The act for Ireland, 1891, provides that on registration an instrument of transfer shall operate as a conveyance and vest the title. This expression is confused, and the idea attempted to be conveyed by it is not

⁵¹ *Munroe v. Adams*, 17 V. L. R. 703 (1891). *Mathieson v. Mercantile Finance Co.*, 17 V. L. R. 271 (1891).

⁵² *Entwisle v. Lenz*, 14 British Col. Repts. 51 (1908).

⁵³ *Westfall v. Stewart*, 13 British Col. Repts. 111 (1907).

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clothed in the terms usually used in Torrens statutes. It might be taken to mean that the instrument conveys and vests the title from its date and by its own force, as soon as it is registered, but there is no reason why registration should not be the operative act under this statute, and it probably means that the registration of the instrument vests the title from the date of registration.⁵⁴

§ 76. Some statutes provide that a voluntary unregistered transfer from a registered owner shall pass a sufficient right or claim to entitle it to registration after the death of the transferror.⁵⁵ In a case where there was no statutory declaration on the subject, it was held that such a transfer passed such a right,⁵⁶ but in another case this was denied.⁵⁷ One act provides that if any person entitled to be registered as owner of any estate or interest in land shall die before being registered, his estate or interest shall be transmitted as if he had been registered.⁵⁸ The vendor of registered land is required to see that the register is placed in condition for a new registration of the title,⁵⁹ but the purchaser must see to the registration of his title.⁶⁰ While it is the duty of the transferror to take the necessary steps to make the registration of his transfer possible, still the transferee may help himself if he chooses to move in the matter, and he may proceed by mandamus against the registrar to compel registration.⁶¹ So long as an instrument is registered before the hearing of an action in which it is used, it is sufficient.⁶² Instruments are registered in the order of production for registration, and not according to date of execution. They have priority according to registration, not according to date of execution. Registration, not date of execution, gives priority.⁶³ For the purposes of priority

54 35, 36 Act for Ireland, 1891.

55 § 163 Manitoba act. § 59 South Australia act. § 30 New South Wales act.

56 *Tierney v. Halfpenny*, 9 V. L. R. 152 (1883).

57 *In re Skinner*, 6 Q. L. J. 68 (1894).

58 § 49 Queensland act, 1877.

59 *Vale v. Blair*, 9 A. L. T. (V.) 90 (1887).

60 *Common v. Rees*, 9 N. Z. L. R.

555 (1891).

61 *Ex parte Clark*, 17 V. L. R. 82 (1891).

62 *Little v. Dardier*, 12 N. S. W. L. R. Eq. 319 (1891).

63 § 58 Ontario act. § 81 Saskatchewan act. § 23 Alberta act. § 53 British Columbia act. § 55 Victorian act. § 12 Queensland act, 1877. § 36 New South Wales act, sub-sec. 3.

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between transferees, mortgagees and others dealing with registered land, the time of filing the instrument is taken as the time of registration.⁶⁴ If two instruments covering the same property are produced for registration at the same time, the one which is accompanied by the duplicate certificate of title is entitled to priority.⁶⁵

§ 77. Registration, Lease, Will, Exceptions. Each act provides that a lease for a certain number of years therein mentioned shall not be the subject of registration. The term of such a lease is usually fixed at three years or less, but under some acts it is fixed at seven years. In Ireland it is fixed at thirty-one years where the tenant is in actual possession, and in England leases or agreements for leases, and other tenancies for any term not exceeding twenty-one years, or for any less estate, in cases where there is an occupation under such tenancies, are not deemed to be incumbrances within the meaning of the registration act.⁶⁶ Such leases are altogether outside of the provisions for registration and give a right of possession for their terms. In some acts it is provided that no voluntary transfer except a will shall convey land, and that a certified copy of the will and of letters testamentary shall be filed with the registrar for entry on the register immediately after the will is probated.⁶⁷ This provision is made to conform to the general law of wills, under which a will operates to convey the land of the testator immediately on his death, but it is in derogation of the general rule of the Torrens system, that registration, and not an instrument, transfers and vests title. Where such a provision is in the statute it recognizes a dealing with the title off the register, destroys the theory of a registered estate only in land, and makes it impossible to claim

⁶⁴ § 49 Illinois act. § 48 Oregon act. § 46 Washington act. § 47 Colorado act. § 37 Minnesota act. § 50 California act. § 55 Massachusetts act. § 56 Hawaiian act. § 56 Philippine act. Rules 19, 160 English act. § 20 Alberta act. § 40 Saskatchewan act. § 58 Ontario act.

⁶⁵ §§ 12, 14, 15, Queensland act, 1877. § 33 New Zealand act. §§

56, 58 South Australia act. §§ 36, 41 New South Wales act. §§ 55, 63 Victorian act. §§ 35, 39 Tasmania act. §§ 53, 58 Western Australia act.

⁶⁶ § 18 English act, 1875.

⁶⁷ § 55 California act. § 45 Minnesota act. § 45 Colorado act. § 54 Illinois act. § 53 Oregon act. § 44 Washington act. § 43 Nova Scotia act.

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that the register and the instruments filed for entry show the person or persons in whom the title rests. It will be observed from the citation just made that such a provision is contained only in the act of Nova Scotia and in some of the acts in this country. According to the foreign acts a registration must be made under the terms of the will before it becomes effective, and in some of these acts it is provided that such registration shall relate back to the date of the death of the testator.

§ 78. When Transfer is Deemed to be Registered. Under some of the acts every grant is deemed to be registered as soon as it has been marked with the folio and volume of the register; all other instruments are deemed to be registered as soon as the memorandum has been entered on the register.⁶⁸ The transfer of land is completed by the entry on the register of the transferee as the registered proprietor of the land, and a charge is completed when the owner of the charge is registered as such.⁶⁹ Registration is deemed to be complete when the certificate is signed and sealed by the registrar, or when the memorial noted on the certificate is signed and sealed by him.⁷⁰ Many of the acts in this country do not state in apt words when the act of registration is complete, but in others it is declared that every transfer is deemed to be registered when the new certificate to the transferee is entered, and all other dealings are considered as registered when the memorial or notation is entered on the last certificate of title set apart for the property.⁷¹

§ 79. Concerning Registration of an Invalid Instrument. Where an instrument dealing with a registered title is informal and lacking in some statutory requirement, and the registrar registers it notwithstanding its defect, it is apprehended that the registration cures the defect in the instrument; but this subject has not been developed as yet.⁷² The registration of

⁶⁸ § 22 Alberta act. § 45 Saskatchewan act. § 54 Victorian act. § 34 Queensland act. § 35 New South Wales act. § 50 South Australia act. § 32 New Zealand act. § 52 Western Australia act. § 34 Tasmania act.

⁶⁹ §§ 22, 29 English act, 1875. § § 33, 41 Ontario act. § 49 Nova

Scotia act.

⁷⁰ § 65 Manitoba act.

⁷¹ § 32 California act. § 49 Illinois act. § 48 Oregon act. § 44 New York act. See also § 55 British Columbia act.

⁷² See *Otago Harbour Board v. Spedding*, 4 N. Z. S. C. 272 (1885). *Moore v. Public Trustee*, 20 N. Z.

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a lease or mortgage, or the entry of a memorial of a lease or mortgage on the register, is not a declaration by the state that such an instrument is a valid and subsisting interest in land; it is merely a declaration that the record of the title appears to be burdened with the lease or mortgage described, according to the priority set forth in the certificate. Such a registration may be at most, and under some acts is, *prima facie* evidence of the existence of the burden. But while registered as a valid and subsisting instrument, the rights of the lessee may have been lost by failure to observe the covenants of the lease, or the rights of the mortgagee never may have attached, because of his failure to advance the consideration, or the mortgage lien may have ceased because of payment of the debt. The mere fact that a lease or mortgage was registered does not estop any party to it from setting up that it now has no force or effect. In this country whenever any interest in or lien on registered land arises adversely to the registered owner, without voluntary action by him, and not pursuant to a judgment or decree of court fixing the interest in a lien on the land, the registration of it is not conclusive as to the regularity of any proceeding or instrument by means of which such interest or lien arose, or as to the validity of such instrument or lien. Such registration has no greater force and effect than the recording of an instrument creating a similar interest or lien would have, in case the land were not registered.⁷³ There is little in foreign Torrens statutes and in decisions under them, which defines the rights of persons who have filed involuntary liens on registered land, and the rule laid down in this country may not apply to the noting of judgments and executions for the sale of property in foreign jurisdictions. In them the registrar acts judicially in making registrations and entries on the register, and it may be that the act of the registrar in noting an involuntary lien is conclusive as to the identity of the land to be affected and as to the validity of all court proceedings, as well as to the priority of the lien. The statutory declaration of indefeasibility of title operates where a writ is noted, a sale on the writ is made, and a new cer-

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tificate of title is issued to the purchaser.⁷⁴ The law on the subject of registration under a forgery is fairly well settled in foreign countries, but there is room for a great development in the law concerning registration of invalid, insufficient and irregular instruments. It is apprehended that such development will be along lines which are inconsistent with our system of jurisprudence.

§ 80 Production of Certificate of Title with Instrument Affecting Title. Under the scheme of the Torrens system, and as a protection to the registered owner, the certificate of title must be produced with any voluntary instrument purporting to affect the title. In some acts it is expressly provided that no new certificate of title shall be entered, and no memorandum shall be made upon the register by the registrar, in pursuance of any voluntary instrument, unless the owner's duplicate certificate is presented with such instrument, except in cases specifically provided for in the act, or upon the order of a court for cause shown.⁷⁵ The other acts in this country provide that on the filing of such an instrument and the production of the owner's duplicate certificate, the transfer or memorial may be registered.⁷⁶ It is evident that under these acts the registrar has no authority to make registration without the production of the certificate of title with the voluntary instrument. Where there is no specific provision in an act that the production of the owner's duplicate certificate is to be a condition precedent to the right of the registrar to make a registration or a memorial, such provision may be inferred from the other requirements or statements of the act. A requirement that the owner's certificate shall be cancelled when a new registration is made, or that a memorial, when registered, shall be noted on the duplicate certificate, is an implication that the owner's duplicate must be presented before a new registration may be made.⁷⁷ Some of the Australasian acts pro-

⁷⁴ *Hassett v. Bank*, 7 V. L. R. L. 380; 3 A. L. T. 38 (1881). See § 116

⁷⁵ § 54 Massachusetts act. § 55 Hawaiian act. § 55 Philippine act. § 49 Minnesota act. § 50 Colorado act. § 49 Washington act. § 46 Nova Scotia act. § 41 Saskatch-

ewan act. § 20 Alberta act.

⁷⁶ § 47 Illinois act. § 46 Oregon act. § 38 New York act. § 48 California act. See §§ 47, 49 Nova Scotia act.

⁷⁷ *Ex parte Bettie*, 14 N. Z. L. R. 129 (1895).

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vide that the duplicate certificate of title shall be produced before the title is transferred or dealt with, but others are not clear on this point. They provide that should two or more instruments signed by the same proprietor, and purporting to affect the same estate or interest, be at the same time presented to the registrar for registration, he shall register and endorse that instrument which shall be presented by the person producing the duplicate grant or certificate of title.⁷⁸ In Ontario the master of titles may require the production of the certificate in any voluntary dealing with land, and may decline to register any dealing unless the certificate is produced.⁷⁹

§ 81. Voluntary Instrument as Evidence of Authority to Register. In some of the acts in this country there are vague expressions with regard to the instruments of transfer which, when presented to the registrar, will authorize him to make registration. In Minnesota it is provided in one section that a voluntary instrument executed by a registered owner shall operate "as authority to the registrar to make registration."⁸⁰ In one section of the California act it is stated that "on the filing of such instrument, the land, estate, interest, or charge shall become transferred, mortgaged, leased, charged or dealt with according to the purport and terms" of the instrument.⁸¹ But from other sections in each of these acts it is evident that no transfer or memorial may be made without the production of the owner's duplicate certificate.⁸² Some acts provide that any instrument purporting to deal with registered land shall take effect "as evidence of authority to the registrar to make registration,"⁸³ but in order to be consistent with the other provisions of these acts, some such words as "when accompanied by the owner's duplicate certificate, or "upon compliance with the terms of this act," should be added.⁸⁴

78 § 33 New Zealand act. §§ 12, 14, 15, Queensland act. §§ 36, 41 New South Wales act. §§ 55, 63 Victorian act. §§ 56, 58 South Australia act. §§ 35, 39 Tasmania act. §§ 53, 58 Western Australia act.

79 §§ 42, 43 Ontario act. See also § 8 English act, 1897. §§ 54, 67 Manitoba act.

80 § 45 Minnesota act.

81 § 55 California act.

82 § 49 Minnesota act. § 48 California act.

83 § 45 Colorado act. § 44 Washington act. § 49 Massachusetts act. § 50 Hawaiian act. § 50 Philippine act.

84 See § 54 Illinois act. § 53 Oregon act.

§ 82. Certificate as Evidence of Authority to Register. In some acts it is declared that whenever any voluntary instrument affecting the title to registered land is presented for registration, the production of the owner's duplicate certificate shall be conclusive authority from the registered owner to the registrar to enter a new certificate, or to make a memorial or notation of registration in accordance with such instrument, and the new certificate or memorial is binding upon the registered owner and all persons claiming under him, in favor of every purchaser for value and in good faith.⁸⁵ In effect this provision seems to declare that if an innocent person for value presents a deed forged by a third person and purporting to be executed by the registered owner, and also presents the duplicate certificate of the registered owner, although it has been stolen from him, the registrar is authorized to make a new registration which will divest the title of the true owner.⁸⁶ This provision goes too far, as it is a cardinal principle of the system that a purchaser must deal with the registered owner of land,⁸⁷ and in some acts it is immediately followed by a proviso, that a registration in succession procured by a forgery is null and void.⁸⁸

A general declaration, that a registrar may make a new registration of the title in succession to a previous registration, on being satisfied with the propriety of it, would seem to confer judicial power on him for that purpose, and it is evident that the acts in this country require the production of the last duplicate certificate issued on the title by the government, in order to state a specific situation in which, and a material condition on which, a valid transfer or memorial may be made by him. The production of the duplicate certificate of the last registered owner is made evidence of his consent to the new registration, but it does not aid the registrar in dealing with the subject matter of the registration. In this country no legislative declaration as to the conclusiveness of authority

⁸⁵ § 50 Colorado act. § 49 Washington act. In § 49 Minnesota act and in § 47 Nova Scotia act the word "conclusive" is omitted.

⁸⁶ See § 128 post.

⁸⁷ § 129, post.

⁸⁸ § 54 Massachusetts act. § 55 Hawaiian act. § 55 Philippine act See § 131, post.

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in the registrar to act, or as to the conclusiveness of any evidence of an indefeasible title in any person, can overcome the constitutional prohibition against the passage by any state of a statute which shall deprive a person of property without due process of law. The New York act which became a law on May 20, 1908, avoids any suggestion whatever that it attempts to confer judicial power on the registrar, and it gives him no power to make a registration, even on the surrender of the outstanding certificate, except on a statement as to the nature and effect of the transfer, agreed to by the parties and reduced to writing. The provision referred to is as follows: "Upon filing such a deed or other instrument in the registrar's office and surrendering to the registrar the duplicate certificate of title, if the interested parties agree in a statement as to the nature and effect of the transfer, the registrar shall enter such statement as a memorial upon the proper original certificate, provided that such statement is not more than one folio (one hundred words) in length." He shall then make the registration, etc. "If the parties in interest fail to agree upon the statement to be entered upon the certificate, the registrar shall refuse to make the transfer until directed by the court as herein provided. Title to such property shall not pass by such transfer until the transfer is registered as prescribed by this section."⁸⁹

§ 83. Notice of the Contents of Instruments of Transfer. One of the objects of the Torrens system is to save a person dealing with registered land from the trouble and expense of going behind the register in order to investigate the history of the vendor's title and to satisfy himself of the validity of it. That end is sought to be accomplished by providing that everyone who purchases land in good faith and for value from a registered owner, and enters his transfer on the register, shall thereby acquire an indefeasible title to the estate with which he is registered, notwithstanding any infirmity in his vendor's title.⁹⁰ It is the scheme of the system that a purchaser may rely on the face of the register to determine the condition of the main title as set forth therein, and that he shall not be

⁸⁹ § 38 New York act.

248. P. C.

⁹⁰ *Gibbs v. Messer*, 1891 A. C.

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required to take notice of the contents of any instrument filed with the registrar in the devolution of it. The parties to such an instrument must take notice of the covenants, conditions and agreements contained therein, but a purchaser may rely on the register. The rule, that a purchaser may rely on the register to determine the status of the main title, is subject to at least one practical exception. The acts provide for the filing of instruments dealing with registered land, and for the notation thereon of the year, month, day, hour and minute of such filing. Many acts expressly provide for the relating back of the registration, when made, to the time of the filing of the instrument, and perhaps this is the legal effect of registration whether it is so declared in the statute or not.⁹¹ A person dealing with land, therefore, must take notice of all instruments and the contents of them, which have been received at the registry, and which have not yet been registered. According to the English rule, "when an instrument purporting to be already executed by a registered proprietor is delivered at the registry for registration, notice of the fact shall be sent to him at his registered address; and unless the execution is admitted by him, the registration shall not be completed until after the expiration of three clear days from the posting of the notice."⁹² It is nowhere contemplated that the register shall be kept down to date, and an examination of the instruments not yet registered must be made, since they take priority according to the order in which they are received for registration. When the transfers of registered land are few in number, and the officers and assistants in the registry are waiting for work to do, it is possible to keep the register posted down to date, and to make it show the condition and state of all registered titles at any given time, but when the system is carrying a fair amount of the dealings in land in any community, instruments will be received at the registry, which cannot be registered immediately. But after an instrument has been registered, where there is nothing in the act, which puts a purchaser on inquiry as to matters contained in the instrument, a sub-purchaser is entitled to rely on the register

⁹¹ Hogg, *Australian Torrens System*, p. 903.

⁹² § 118 English rules, 1908.

as a certificate of the standing and condition of the title.⁹³

§ 84. Statutory Declarations as to Notice of Instruments. The rule, that persons dealing with registered land may rely on the register, and may not be required to take notice of the contents of instruments relating to the devolution of the main title, may be greatly modified or entirely changed by statute. Several acts contain sections which must be studied carefully since they seem to affect this rule. In some acts it is provided that upon registration every instrument shall be deemed to be embodied in the register-book as part and parcel thereof, and shall have the effect of a deed duly executed by the parties signing the same.⁹⁴ When taken in connection with other positive declarations of these acts, these sections seem to mean that when an instrument has been registered it is an executed contract, so far as the registration is concerned, but that the instrument is deemed to be embodied in the register for the purpose of evidencing the date, terms and covenants of the original contract, and of defining all personal rights of the parties to it.⁹⁵ It must be admitted that this interpretation of the meaning of this section is not derived from the language used. If we should examine this section apart from the context of an act in which it is found and should take the language literally, we should conclude that an instrument of transfer filed and registered by the registrar is a part and parcel of the register, is notice to all persons subsequently dealing with the land, and must be examined in order to determine the condition and state of the title. But this is a complete abandonment of an essential purpose of registration acts, and makes them nugatory and useless. Unless compelled to do so by very definite and direct provisions of an act, courts will not hold that a person dealing with registered land may not rely on the register as to the status and condition of a title, but must examine all instruments of transfer constituting the devolution of the title to

⁹³ *Brown v. Railway Co.*, 17 N. Z. L. R. 471 (1898).

⁹⁴ §§ 35, 36 New South Wales act. § 35 Queensland act. § 32 New Zealand act. § 57 South Australia act. § 34 Tasmania act. § 52 Western Australia act. § 54 Vic-

torian act. § 81 Manitoba act.

⁹⁵ Hogg, *Australian Torrens System*, pp. 902, 904, citing *Mathieson v. Mercantile Co.*, 17 V. L. R. 271 (1891). *Munro v. Adams*, 17 V. L. R. 703 (1891).

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determine the effect of them. Time and again, courts have complained that different sections of a registration act are at variance and contradictory, and they have subordinated the language of some section to the general scheme and purpose of the act. They have fallen back on the rule of statutory construction that, in interpreting such an act, courts must look to its scope and objects, and not to one section alone. The trouble about this procedure is that this reconciliation of conflicting provisions of an act is judicial legislation which cannot be foreseen or anticipated. The student and the practitioner must take a section as he finds it, and must give to it the force and effect which its language clearly indicates it should have.

§ 85. Some sections declaratory of the notice imparted by instruments of transfer are more confusing than the one which we have just considered. One act provides that "no person other than the parties thereto shall be held to have any notice of the contents of any instrument other than those instruments mentioned in the existing register of title of the parcel of land, or which have been duly entered in the books of the office kept for entry of instruments received or in course of entry."⁹⁶ The effect of this section is not clear to one who is not familiar with the working of the act in Ontario. The instruments described in the exception seem to be all instruments filed in the office. The New York act provides that "all papers filed by the registrar, and indexed and entered by him pursuant to this act, shall be of equal effect as to notice, in the order of their filing as shown by their filing numbers, as are similar papers when recorded by county clerks or registers under the recording acts."⁹⁷ In some acts it is provided that every conveyance, lien, decree or judgment, or other instrument or proceeding, which would affect the title to unregistered land under existing laws, if recorded or filed with the recorder or register of deeds, shall in like manner affect the title to registered land if filed and registered with the registrar in the county where the real estate is situated, and shall be notice to all persons from the time of such registering or filing.⁹⁸ The

⁹⁶ § 84 Ontario act.

⁹⁷ § 42 New York act.

⁹⁸ § 49 Oregon act, as amended in

1907. § 46 Minnesota act. § 46

Colorado act. § 50 Massachusetts

act. § 51 Hawaiian act. § 51 Phil-

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language of these sections seems perfectly clear, and the effect of them seems to be to make instruments of transfer of registered land constructive notice to all the world of everything contained in them, just as deeds are under the recording acts. It is only necessary to add that if these sections mean what they say, a purchaser of land registered under an act containing such a section must deraign his title just as he does under the recording laws.

§ 86. Notice of Contents of Mortgages, Leases, etc. While, according to the scheme of the Torrens system, a bona fide purchaser for value is not charged with notice of the contents of instruments constituting the devolution of the title, he is charged with notice of the contents of all mortgages, leases and other instruments which are noted on the certificate as burdens on the title. The memorials and notations of instruments on the face of the register, derogatory to the title, do not assume to set forth in detail the burdens to which the title is subject; they are mere notes of reference, and the purchaser at his peril must examine such instruments and ascertain the contents of them. He must take notice of the terms and conditions of a registered mortgage, lease, decree of court or other instrument noted on the certificate. He must take notice of every possible right which a tenant may have in the land under his lease, whether it be a right of renewal or an option to purchase the land.⁹⁹ In case of a variance between the memorial and the original instrument, the latter prevails.

§ 87. May an Instrument contain Conditions, Limitations, Restrictions, Forfeitures and Covenants, running with the Land. It is evident that the power of a registered owner to deal with his land on the register is controlled by the terms of the registration act under which he is holding. It is important that clear and explicit provisions of the act shall state the dispositions which are authorized by it, and shall describe in detail the incidents and effect of such dispositions. It is to be regretted that none of the acts is specific in these matters. In each act there is a series of elaborate provisions concerning

ippine act. § 45 Washington act. § 99 § 124, post.
44 Nova Scotia act.

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registered dealings with registered land, but the power of the registered owner to deal with his land is not fully defined. Before we examine the different acts in order to determine whether the registered owner may deal with his land with the same freedom of contract with which an owner may deal with unregistered land, it may be well to examine the preambles to some acts and the entitlement of other acts. The preamble to the original Torrens act was: "Whereas, the inhabitants of the province of South Australia are subjected to losses, heavy costs and much perplexity, by reason that the laws relating to the transfer and encumbrance of freehold and other interests in land are complex, cumbrous and unsuited to the requirements of the said inhabitants," etc. The act was entitled "an act to simplify the laws relating to the transfer and encumbrance of freehold and other interests in land." The preambles to the South Australia act, 1874, and the Western Australia act, 1874, set forth that it is expedient "to render dealings with land more simple and less expensive." The New Zealand act, 1870, is "an act to simplify the title to and the dealing with estates in land." The Queensland act, 1861, and the Tasmania act, 1862, are acts "to simplify the laws relating to the transfer of land." The Victorian act, 1890, and the Western Australia act, 1893, are acts "to consolidate the law relating to the simplification of the title to and dealing with estates in land." The English and Ontario acts are entitled acts "to simplify titles and to facilitate the transfer of land." The Canadian acts are called "real property acts" or "land title acts", relating to the registering and transfer of land. In Massachusetts, Hawaii and Washington the acts are "to provide for registering and confirming titles to land." In Illinois and Colorado they are acts "concerning land titles." In the other states they are as follows: In Minnesota, "an act concerning registration of land and the title thereto;" in Oregon, "an act concerning land titles * * * providing for the registration of title to real estate;" in California, "an act for the certification of land titles and the simplification of the transfer of real estate;" in New York, "an act in relation to registering titles to real property and facilitating and expediting its transfer."

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It is obvious that these preambles and entitlements do not disclose any fixed purpose to simplify titles, running through all the acts, but this is the declared object of many of them. In all the literature on the subject of the Torrens system, it is assumed that the recording system is too elaborate and complex, and that it should be replaced by a system of simple titles. Although some of the acts do not expressly declare that they are passed in order to simplify titles and the transfer of land, it may be assumed here that such is the purpose of registration acts. The only way to simplify titles is to exclude from them all the elements which make them complex and complicated. These elements manifestly are all trusts, conditions, limitations, reservations, restrictions, equities, forfeitures and covenants running with the land and hampering its use. If fee simple titles only may be transferred and registered, without any of these complicating elements, the new system of dealing with lands is certainly simple. It may restrict the power of the registered owner to deal with his title, and it may limit his power to contract with reference to his title, but it is nevertheless simple. If, however, a registered owner may deal with his title under the new system in the same manner as under the old system, nothing is gained in the way of simplifying titles. If the register and the duplicate certificate of title set forth that the registered owner holds the title "subject to the conditions, covenants and restrictions contained in a deed," describing it, the deed so described becomes a part of the register and must be consulted and construed by any subsequent dealer with the land; and the new registered owner takes a title subject to conditions which may involve a forfeiture. The mere registration of a title containing covenants, conditions and restrictions will not tend to simplify it, and a reference to or statement of such burdens on the title may render registration practically useless by leaving the certificate open to be defeated by matters of fact outside of the register. It may be said that a study of the foreign acts does not disclose the underlying principle upon which titles are simplified by them. Mortgages and leases are noted on the register in general terms of brief description, but it is evident that such instruments must be examined in order to

determine what covenants and conditions are set forth and specified in them. Many acts are entirely silent as to whether covenants, conditions, restrictions, reservations or limitations may be placed in an instrument of transfer of title, and the decisions of the courts on the subject are hopelessly at variance.

§ 88. Two cases on this subject are of special interest. Where certain covenants running with the land were contained in the instrument transferring the title, but these covenants were not noted on the register or in the owner's duplicate certificate, and the registered owner sold the land and transferred it to a person who had no actual notice of the covenants, it was held that the latter purchaser was not bound by the covenants, that where there is nothing in the act which puts a purchaser on inquiry as to matters contained in the instrument transferring the property, a sub-purchaser is entitled to rely on the certificate of title.¹ In discussing these points the court indicated that it was the duty of the registrar to note on the register any covenant running with the land, and it suggested that the assurance fund was liable for his omission to do so. Thereupon the transferror, who had placed the covenants in his transfer, brought an action against the assurance fund to recover for the loss sustained by him through the omission of the registrar to note the covenants on the register, and in this case the court said: "The purpose of the land transfer acts, from the original act of 1870 to the present time, has been to simplify and cheapen the transfer of land and of interests therein, and to insure security of title. The scheme devised to carry this purpose into effect is the creation of a register, each folio of which is to show upon its face the exact interest of the registered proprietor, and the encumbrance to which such interest is subject. The document of title which evidences the title of each registered proprietor to any land is a duplicate of the folio in the register relating to such land. No interest in land passes by the execution of an instrument purporting to create it; but upon the registration of such an instrument, the estate which it purports to create does pass. It is obvious that such a system, while it is simple and affords security of title, is wanting in elasticity and that it is adapted only to the record of simple transactions; and accordingly provision has

¹ Brown v. Railway Co., 17 N. Z. L. R. 471 (1898).

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been made for excluding from the register all notice of trusts, and also, it seems to me, of equities. Provision has been made, however, for the registration of all ordinary legal interests, such as leases, mortgages, easements, rent-charges, etc.; and ever since the inception of the scheme it has been the common understanding of the legal profession that those interests only which are expressly authorized can be entered upon the register. * * * There is nowhere in the statute any provision authorizing the registration of any instrument creating an equitable interest,—even such an instrument as an agreement of sale; there is certainly nothing in the act which even remotely suggests that a covenant hampering the use of land, or precluding the registered owner of a freehold interest in land from setting up any right incident to his ownership, could be registered. If all instruments which affect, or purport to affect, interests in land could be registered, the special provisions authorizing the registration of instruments creating certain specified interests would have been entirely unnecessary.”² The court referred to the suggestion in the former case, that an action would lie against the assurance fund for the omission of the registrar to note the covenants on the register, and insisted that the suggestion had been made inadvertently and without due consideration of the duties of the registrar. The argument in this case is very convincing, and the decision is in line with the method of simplifying titles by excluding complex elements. According to this decision an act for the registration of titles covers the whole ground, and no interest in land may be registered unless the act specifically provides for the registration of it.

In one case it was held that a condition of forfeiture contained in an instrument is opposed to the policy of the acts and should not be registered, that it is not competent for parties to invest a body, not possessed of powers for judicial investigation of facts, with the conclusive determination of facts which might constitute a forfeiture.³ Unless power is given under the act, no provision may be inserted in a lease prohibiting the assignment of a lease, and such a condition, if inserted, is ineffectual.⁴

² *Wellington Railway Co. v. Registrar General*, 18 N. Z. L. R. 250 (1899), citing *Staples v. McKay*, 11 N. Z. L. R. 258.

³ *Matt v. Peel*, 2 V. R. (m) 27, 31; 2 A. J. R. 133 (1871).

⁴ *Ex parte Bond*, 6 V. L. R. (L.) 458 (1880).

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§ 89. It has been held that the Torrens system does not recognize equitable interests on its registry or certificates, and that covenants in an instrument of transfer cannot be registered so as to bind a purchaser with notice and make his title subject to the burden of them.⁵ But there are cases which lay down the principle that rights are to be preserved under the Torrens system, which are enforced under the general law.⁶ It is impossible for one who is not thoroughly familiar with the spirit, history and practice of the Torrens system in Australasia to determine from the authorities whether agreements, conditions and covenants contained in an instrument of transfer may be registered. A learned author has said: "The subject of covenants, relating to the use of the land, which bind successive proprietors,—or, in ordinary language, run with the land—apart from the ordinary relation of lessor and lessee, is a difficult one. * * * It need only be here mentioned that, as on the question of what interests created by covenant can be protected by caveat, so on the question of what covenants contained in statutory instruments relating to the land can be registered, the authorities are at variance. The reasoning, which seems to be in favor of the view that covenants relating to the land may be protected by caveat, seems also to favour the view that such covenants, when contained in statutory instruments, may be registered."⁷

If one is disposed to assume that one object of the Torrens system is to simplify titles by excluding from instruments all conditions, limitations, restrictions and contingencies, he is met by the fact that schedule F., a "bill of trust," of the original Torrens act, 1857, was as follows: "I, A. B., being seized, etc., desire to invest all my estate and interest in the above described land (or a lesser estate in the said lands, specifying the nature and limitations of such lesser estate, and all conditions, restrictions, limitations and contingencies, reversions and remainders, to which it is desired to subject the same) in trust for the uses and benefit of C. D. * * * and do therefore transfer, set over, and appoint all my estate and interest in said lands * * * to E. F. and G. H. as trustees, to have and to hold the said estate and interest, in trust, for

⁵ *Staples v. Corby*, 19 N. Z. R. 517, 537 (1900). *Ex parte Johnson*, 5 W. W. & a'B (L.) 55 (1867). *Rogers v. Hosegood*, 2 Ch. 388 (1900).

⁶ *Bucknall v. Reid*, 10 S. A. R.

188 (1876). *In re Association*, 25 V. L. R. 77 (1899). *In re Tanner*, 5 N. Z. S. C. 102 (1886).

⁷ *Hogg*, *Australian Torrens System*, pg. 941.

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the uses and benefit of C. D., subject to the said conditions, limitations, restrictions and contingencies, reversions and remainders above set forth and specified'' * * *.⁸ The statement is frequently made that one of the benefits to be derived from title registration is the keeping from the register of the title all trusts, conditions, limitations and contingencies and the preventing of the encumbrance of the register. It is often said that the Torrens system is designed to prevent the complication of titles. It is difficult, however, to state just how this is accomplished. Instruments may contain restrictions, covenants and limitations, and such burdens on the land may be shown on the register by means of a note to the effect that there are such burdens. The instrument is filed away for reference and may be inspected by any person dealing with the land. Of course this introduces the necessity for an investigation off the register, but the notation of all burdens and conditions in full on the face of the register would make it so bulky as to lose a great part of its value. There are no adjudications showing just how far a new purchaser is bound by such a note, but it is apprehended that he would be bound to find the burdens and to construe rightly their legal effect. Since some conditions on the use of land are so framed as to work a forfeiture of title in case of breach, the notation of conditions, limitations, etc., does not tend to the simplification of registered titles. In Fiji, when conditions are contained in any instrument of transfer or transmission, they may not be registered, but any person claiming to be interested in any such condition may file a caveat for the protection and determination of his rights.⁹ Under the act for Ireland, 1891, covenants and conditions in any instrument may be registered, and may be removed by court on proof that they are no longer enforceable or do not run with the land, or they may be modified on proof that the modification will be beneficial to the persons principally interested in the enforcement thereof.¹⁰ A purchaser who has obtained and registered a transfer of the estate or interest of a registered owner, appearing on a certificate of title, takes an absolute and indisputable title to such estate

⁸ See also § 74 Victorian act. §§ 68, 222, Western Australia act.

⁹ § 16 Fiji Ordinance, 1876.
¹⁰ § 45 act for Ireland, 1891.

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or interest, except in case of fraud. To suggest that his mere knowledge that a former certificate contained restrictions, conditions, limitations, clauses of forfeiture or covenants running with the land, made it a fraud on his part to accept the transfer without inquiry as to such matters, is futile. It would be disastrous to the working of the system to hold that a new transferee, in the absence of fraud, was bound by such knowledge. He is protected by the statutory declaration of indefeasibility of title, and he need not investigate the title from its commencement in order to see how or when such burdens were removed.¹¹ Under the Torrens system, in the absence of fraud, an indefeasible title is given to everything which may be registered, but nothing may be registered except such things as are authorized by the statutes.¹²

§ 90. Conditions and Covenants in England and Ontario.

There may be registered as annexed to any land which is being or has been registered, subject to general rules and in the prescribed manner, a condition or covenant that such land or any specified portion thereof is not to be built on, or is to be or not to be used in a particular manner, or any other condition or covenant running with or capable of being legally annexed to land. The first owner, and every transferee, and every other person deriving title from him, shall be deemed to be affected with notice of such condition or covenant. Any such condition or covenant may be modified or discharged by order of the court, on proof to the satisfaction of the court that the modification will be beneficial to the persons principally interested in the enforcement of the condition or covenant.¹³ By the English act, 1897, the above section is amended so as to provide that conditions may be annexed to land at any time, and that the section shall apply to any restrictive condition capable of affecting assigns by way of notice.¹⁴ Under this amendment only restrictive or negative covenants may be annexed to land. Covenants to do work or to spend money are merely contractual and personal and do not affect

¹¹ King v. Price, 24 N. Z. L. R. 291 (1904).

¹² Fells v. Knowles, 26 N. Z. L. R. 604 (1906).

¹³ § 84 English act, 1875. See

Rules, 40, 102 and 184. § 104 Ontario act. See Rule 223 English rules, 1908.

¹⁴ Schedule 1, English act, 1897.

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purchasers, even though they have notice.¹⁵ Covenants and conditions which do not run with the land are excluded from the register as far as is practicable. When positive and negative covenants are so intermingled in one document that they cannot be separated, the whole document is registered, with a note confining the operation of the entry to such of the conditions as are within the section.¹⁶

§ 91. Covenants, Reservations and Restrictions in Instruments Under the Acts in This Country. In some of the acts in this country it is expressly provided that "an owner of registered land may convey, lease, charge or otherwise deal with it as fully as if it had not been registered."¹⁷ In New York it is provided that "each registrar shall provide a book to be known as the book of covenants, restrictions and forms. * * * Any person may have recorded in this book any covenant, restriction or form he may present for that purpose on payment to the registrar at the rate of fifty cents per folio. The covenant, restriction and form so entered shall be numbered consecutively and shall be written in the book with India ink or equally permanent ink in a clear and legible manner under the number given to it. References in any documents issued by the registrar to any covenant, restriction or form recorded in this manner shall be as follows: Subject to restriction, (or covenant or form) recorded under No.----- in the book of covenants, restrictions and forms, in the registrar's office in this county."¹⁸ In other acts it is declared that on the filing of any deed, mortgage, lease or other instrument purporting to deal with registered land, "the land, estate, interest or charge shall become transferred, mortgaged, leased, charged or dealt with according to the purport and terms of the deed, mortgage, lease or other instrument."¹⁹ It seems to be clear that in this country an owner may deal with registered land as fully as if it had not been registered, and that it is the

¹⁵ *Austerberry v. Oldham*, 29 Ch. Div. 750. See *London and S. W. Ry. Co. v. Gomm*, 20 C. H. Div. 562. *Tulk v. Moxhay*, 2 Ph. 774.

¹⁶ *Brickdale and Sheldon, Land Transfer Acts*, p. 208.

¹⁷ § 49 Massachusetts act. § 50

Hawaiian act. § 50 Philippine act. § 44 Washington act. § 45 Minnesota act. § 45 Colorado act.

¹⁸ § 40 New York act.

¹⁹ § 55 California act. § 54 Illinois act. § 53 Oregon act.

duty of the registrar to note all covenants, conditions, restrictions and limitations on the face of the register in such a manner that a purchaser shall have notice of them. While this does not tend to the simplification of titles,—may give rise to uncertainty as to what covenants run with the land and as to what covenants are merely contractual and personal, and may sometimes bring about litigation, it at least avoids the criticism so often made that the Torrens system abridges and limits the power of a registered owner to contract with reference to his land. It is further provided in the acts in this country that if land is impressed with any equitable condition or limitation, the particulars thereof shall not be entered on the register, but a memorial thereof may be entered by the words “upon condition,” or “with limitations” or other apt words, and by a reference by number to the instrument authorizing or creating it.²⁰ After such a registration, a transfer may be made only by an order of court, or by such methods of procedure as are designated by the statute.²¹

§ 92. Memorial Carried Forward. Whenever a memorial or notation has been entered on the register, the registrar must carry it forward upon all new certificates of title issued by him until it is cancelled in some authorized manner.²²

§ 93. Instruments to be Used in Dealing With Registered Land. In the foreign acts the forms for instruments to be used in dealing with registered land are prescribed in rules and schedules. In the acts in this country it is provided that any forms of deeds, mortgages, leases or other instruments, which are sufficient under existing laws for the purpose intended, may be used in dealing with registered land.²³ In California this clause is added: “But an indorsement, duly acknowledged, upon the duplicate certificate of title, substantially in the fol-

²⁰ § 59 Minnesota act. §§ 64, 65 Massachusetts act. §§ 65, 66 Hawaiian act. §§ 65, 66 Philippine act. § 64 Colorado act. § 63 Washington act. §§ 67, 68, 69 California act. § 69 Illinois act. § 68 Oregon act. See §§ 64, 65 Nova Scotia act.

²¹ See § 101, post. The same provisions apply under the acts whether land is registered “in trust,” “upon condition,” or “with limi-

tations.”

²² § 35 New York act. § 45 Illinois act. § 51 Washington act. § 59 Hawaiian act. § 58 Massachusetts act. § 50 Minnesota act. § 44 Oregon act. § 52 Colorado act. § 43 California act. § 59 Philippine act. § 32 New South Wales act.

²³ § 38 New York act. § 47 Illinois act. § 46 Oregon act. § 45 Colorado act. § 45 Minnesota act. § 44

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lowing form, viz: 'I,-----, grant to-----the real property described in this certificate. Witness---hand and seal, this----day of-----', shall be sufficient to transfer the property in said certificate described." In Nova Scotia the registered owner may use the forms prescribed by the act, or he may use any form of instrument sufficient in law, before the passage of the act, for the purpose intended.²⁴ There is an impression that the forms prescribed in the acts may not be varied, and that all dealings with registered land are confined within a narrow compass, but the practice is to permit variations in the forms, so long as they are consistent with the principles of the acts. Of course no modification may be made in a form so as to give notice of a trust or to refer to instruments off the register. The English rules expressly provide that such modifications and additions may be made to the forms as the registrar will permit.²⁵ Where transfers of registered property are made on the ordinary forms of conveyancing under the general law, it is natural that the customs of ordinary conveyancing should be adopted in dealing with registered land. A purchaser of registered land will often execute a mortgage on it before the deed to him has been registered, intending that the deed to him and the mortgage from him shall be registered at the same time. This practice seems unobjectionable.²⁶ In California it is provided that any instrument dealing with the title to registered land shall give the number of the certificate of title of the land described therein.²⁷ It is no particular and distinctive feature of the Torrens system that under it instruments affecting title to lands are not required to be under seal or attested. Seals and attested instruments have been abrogated and done away with under the general laws in many jurisdictions. In registration acts the term "any instrument" is used with great frequency, and it is used in a broad sense which includes any document relating to land, such as a deed, will, map, plan, survey, writ, certificate of probate, exemplification of a will, or any other document in

Washington act. § 49 Massachusetts act. § 50 Hawaiian act. § 50 Philippine act. § 53 California act. § 43 Nova Scotia act.

25 §§ 97, 98, English rules, 1908.

26 Hogg, Australian Torrens System, p. 912.

27 § 53 California act.

writing relating to the transfer of or other dealing with land, or evidencing an interest in or title to land.

§ 94. Instruments Filed With the Registrar Are a Perpetual Deposit. All instruments, documents and papers filed with the registrar are numbered in the order in which they are received, and are endorsed with the year, month, day, hour and minute in which they are filed. They are retained and kept as a perpetual deposit in the registrar's office.²⁸ Under rules in England and Ontario, instruments filed in the office of the master of titles may be destroyed when they have become altogether superseded by entries in the register or have ceased to have any effect.²⁹

§ 95. Access to Filed Instruments. Is the Register a Public Record? Where under the law and instrument filed in a public office is constructive notice to the public of the contents of it, there is a corresponding right in any member of the public who may be interested in it to examine it. It would be monstrous to require a person to take notice of an instrument and to give him no right to examine the contents of it. Under statutes declaring that all instruments and documents filed or registered by the registrar shall be notice to all persons from the time of such filing or registering, interested members of the public have the right to inspect them. So long as an instrument is filed with the registrar and is not yet entered on the register, it is constructive notice to any person dealing with the land described in it, and during that time any interested person may examine it. But where there is nothing in the act which requires a purchaser to take notice of an instrument after it has been registered, it ceases to be constructive notice on registration, and after that time it is not necessarily open to public inspection. It may be stated as a matter of history that when the act was put into operation in Chicago, the registrar declined to permit any person to examine the registered instruments in his office, on the ground that they were not con-

²⁸ § 51 Illinois act. § 50 Oregon act. § 51 California act. § 47 Colorado act. § 46 Washington act. § 143 British Columbia act. § 46 Saskatchewan act. § 23 Alberta act.

§ 48 Nova Scotia act. Rule 52 Ontario act.

²⁹ § 321 English rules, 1908. Rule 58 Ontario act.

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structive notice, and that persons dealing with registered land must rely on the face of the register. When it was afterward found by experience that many persons were unwilling to deal with land according to this new method of disclosing titles, and that in many instances registered land could not be dealt with on the market without an abstract of the conveyances, showing the devolution of the title, or without a policy of title insurance, all registered instruments were freely submitted to public inspection. In introducing and carrying on a new system of dealing with land, it is not good policy to refuse an inspection of instruments filed in a public office, and by doing so to arouse unnecessarily the prejudices of persons who are accustomed to the requirements of a well established system. Since the registrar in this country is a ministerial officer merely, it is not unreasonable for a purchaser of land to insist that the work of the registrar shall be reviewed before he pays over the consideration for a transfer. Under some acts all records and papers relating to registered land in the office of the registrar are open to the public, subject to such reasonable regulations as he may make under the direction of the court of land registration.³⁰ Under one act they are open to the inspection of the public at such times and under such conditions as the court may prescribe;³¹ and under another act they are open to public inspection in the same manner as are now the papers and records in the office of the county clerk and recorder.³² In Nova Scotia any document may be inspected by any person upon payment of the prescribed fee.³³ For the purpose of inspection during the hours and upon the days appointed for search, any person, on payment of the prescribed fee, may have access to the register-book and to all instruments filed.³⁴ In Ontario, subject to such regulations and to the payment of such sums as may be fixed by general rules, any registered owner, or his agent, or any person authorized by an order of court, or by general rule, may inspect and make copies of and extracts from any document in the custody of the master of titles, relating to registered land or a charge

30 § 55 Massachusetts act. § 56
Hawaiian act. § 56 Philippine act.
31 § 37 Minnesota act.

32 § 47 Colorado act.
33 § 47 Nova Scotia act.
34 § 121 Queensland act. § 65

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thereon; but no other person is entitled to do so.³⁵ In England it is provided that no general rule concerning the inspection of the register shall permit the inspection of any entry in the register, except by or under the authority of some person interested in the land or charge to which the entry refers.³⁶ Any estate or interest in land less than a fee simple is registered by the entry of a memorial on the register. This entry is necessarily a brief memorandum describing in the most general terms the instrument under which the lesser estate is created. It seems to be clear that anyone interested in the title has a right to inspect the original instrument for the particulars contained therein. Anyone interested or about to deal with the title might well insist that he desired to see the original lease, mortgage or charge registered against the land. In Australasia "the bound-up certificates of title constitute what is generally known as the register-book. This, however, is not the whole of the register, for there are two other collections of documents which form important adjuncts to it, and without which the certificates of title are not absolutely complete. These consist, first, of the instruments of transfer, lease, mortgage, charge, etc., which have been executed by registered proprietors, and on the faith of which entries have been made in the register-book; and, secondly, of maps and plans deposited either on the land being originally brought under the system, or subsequently on a single parcel of land being subdivided. * * * And references to maps deposited in other public offices than the registry are also noted in a certificate of title, and such references have the effect of practically incorporating the maps referred to in the certificate of title, so as to fix with notice of their contents anyone who inspects the certificate of title."³⁷ On tender of the proper fee therefor, any person is entitled to a duly certified copy of any record or paper, with all memoranda and endorsements thereon. Unless otherwise provided, the fee is the same as is allowed to a clerk or recorder for a like certified copy.³⁸

In Australia, it seems, the lodging of a caveat on the register is not notice to the public, and does not affect dealings with

South Australia act. § 106 Tasman-
ia act. § 116 New South Wales act.
§ 40 New Zealand act. § 239 West-
ern Australia act. § 241 Victorian
act.

³⁵ § 150 Ontario act. See to same
effect § 104 English act, 1875.

³⁶ § 22 English act, 1897. § 284
et seq. English Land Transfer
Rules, 1908.

³⁷ Hogg, Australian Torrens Sys-
tem pg. 763.

³⁸ § 51 California act. § 48 Col-
orado act. § 55 Massachusetts act.

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the property outside of the office of the registrar. Where a caveat has been filed, but no notice of it has been given to the mortgagee personally, it is unnecessary for a registered mortgagee, who is paying out the money to the mortgagor from time to time in installments, to search the register for caveats before paying over an installment.³⁹

§ 96. Transfer of Land. A study of the Torrens system will disclose that the word "conveyance" is seldom used to denote the alienation of an interest in registered land; under this system such alienation is called a transfer. The acts usually speak of a transfer of land in the sense of a transfer of an estate of fee simple. A transfer gives to the new registered owner of the estate all the rights in the property, which were possessed by the prior registered owner and such additional rights, as against unregistered equities, as are conferred by the statutes. But the owner of registered land may transfer his whole interest to the transferee, or he may create a new interest in the land by an instrument of transfer, though this new interest must, of course, be less than the whole interest of the transferor.⁴⁰ He may transfer a life estate, or an estate for a term of years, though in some jurisdictions such interests in land are deemed to be more in the nature of encumbrances than of estates in land. Under the Fiji ordinance establishing a system of registration of titles, a life estate in registered land is declared to be in the nature of an encumbrance, and is registered as such on the register by notation on the duplicate certificate of title of the proprietor of the fee simple.⁴¹ A transfer is defined as the passing of any estate or interest in registered land, whether for a valuable consideration or otherwise.⁴²

§ 56 Hawaiian act. § 56 Philippine act. § 47 Washington act. § 37 Minnesota act.

³⁹ Queensland Trustees v. Registrar, 5 Q. L. J. 46, 1893.

⁴⁰ Formby v. Adelaide Corpora-

tion, 14 S. A. R. 146 (1880).

⁴¹ §§ 18, 19 Ordinances of Dec. 29, 1876.

⁴² § 3 Tasmania act. § 3 Queensland act. § 3 New South Wales act.

CHAPTER IX.

Trust Estates, Mortgages, Judgments, Liens.

§ 97. **Trust Estates.** According to the preamble to the first Torrens act in 1857, the evils to be remedied by the act were losses, heavy costs and much perplexity, for the reason that the real estate laws of the country were complex, cumbrous and unsuited to the requirements of its inhabitants. Estates in trust were within the preamble, and, in fact, were the estates against which it principally was aimed. Trusts were not to be entered on the register, and a purchaser for value in good faith was not required to take notice of any of the burdens of the trusts upon which the registered owner held the land. At first and for some time it was supposed that the Torrens act was a mere adaptation of the shipping act to land and to the transfer of land, and that under it there could be no transfer of equitable as distinguished from legal interests; it was supposed that by the act all trusts in registered land were abolished.¹ But it was held that there was nothing in the policy of the act, which rendered it necessary that trusts should not exist between parties, so long as purchasers for value in good faith were not required to take notice of trusts, and that the system of trusts was untouched, except in the case of a sale to an innocent purchaser.² As between the immediate parties to a contract or to an equitable relation, a certificate of title does not alter their rights against and liabilities to each other. As

¹ *Lange v. Ruwoldt*, 7 S. A. L. R. 173 (1883). *Cuthbertson v. Swan*, 1 (1872). 11 S. A. L. R. 102 (1877). § 51

² *In re Bosquet*, 17 S. A. L. R. Queensland act, 1877.

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between the trustee and the cestui que trust a certificate of title does not put an end to the trust, and the cestui que trust may always enforce his rights against the trustee.³ But the declared object of the earlier Torrens acts was to simplify titles to and dealings with estates in land, and the method of accomplishing that object was to provide that only simple transactions in real estate should be registered. Trusts in land were obviously a source of great complexity in titles, and it was necessary to deal with them in such a manner as to relieve a purchaser from notice of the terms of a trust. Accordingly provision was made for excluding from the register all notice of trusts. This was not so radical a measure as it may seem at first impression. It is quite customary for the donor of a trust to vest title to the property in the trustee, giving him power to sell the land and to invest and reinvest the proceeds of the sale, and declaring that no purchaser of the land shall be required to inquire into the necessity or expediency of the sale or to see to the application of the proceeds. It is competent for the legislature to provide that all trusts in land under the Torrens system shall have the same effect as such trusts under the general law, and that no cestui que trust shall have any greater security and protection under the Torrens system than is afforded to him under such a trust under the general law. Such is the effect where the Torrens act provides that the trustee shall be registered as the absolute proprietor and that no notice of any trust shall be placed on the register. In one case the cestui que trust is as much in the hands of the trustee as he is in the other. In some foreign acts the duty is imposed on the registrar to inquire into the transfer and to determine whether it is made according to the terms of and for the purposes of the trust, but under most of the foreign acts the registered trustee is regarded as the owner of the land, and he may transfer it as such. Under many acts trusts may not be registered, and no notice of any trust, whether express, implied or constructive, may be entered on the register.⁴

³ Paora Torotoro v. Sutton, 1 N. Z. J. R. N. S. C. S. 57. Kissling v. Mitchelson, N. Z. L. R. 3 C. A. 261. National Bank v. National Mort-

gage Co., N. Z. L. R. 3 S. C. 257.

⁴ § 57 Victorian act. § 162 South Australia act. § 66 Tasmania act. § 79 Queensland act. § 82 New

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§ 98. Under some acts no memorandum or entry may be made upon the register of any notice of a trust, whether express, implied or constructive. The registrar must treat any instrument containing any notice as if there were no trust, and the trustee therein named is to be deemed to be the absolute and beneficial owner of the land for the purpose of the acts.⁵ Under the Manitoba act every certificate of title issued to an administrator, executor or trustee under a will shall describe him as such, and the will shall be deemed to be embodied in and to form part of the certificate, and before registering any dealing with the land, the registrar shall satisfy himself that such dealing is in accordance with such trusts and purposes.⁶ Except in the cases just mentioned, and except in case of land held in trust for or to be used in connection with any church, the registrar shall not make an entry in the register, containing any notice of a trust, whether express, implied or constructive; and except in the cases just mentioned, the describing of an owner as the trustee, whether the beneficiary or object of the trust be mentioned or not, shall not impose upon the registrar the duty of making any inquiry as to the power of the owner in respect to the land, mortgage, or charge, or money secured thereby or otherwise, but, subject to the registration of any caveat, the land, mortgage or charge may be dealt with as if such description had not been inserted.⁷ In Ontario it is provided: "There shall not be entered on the register, or be receivable by the master of titles, any notice of any trust, express, implied or constructive. Describing the owner of any freehold or leasehold land, or of any charge, as a trustee, whether the beneficiary or object of the trust is mentioned or not, shall not be deemed a notice of a trust within the meaning

South Wales act. § 122 New Zealand act. § 55 Western Australia act. § 63 Act for Ireland, 1891. A judgment against a person cannot be registered against land which he holds as executor. *Balding v. Nicholas*, 19 V. L. R. 110 (1893).
⁵ § 79 Saskatchewan act. § 47 Alberta act. See § 40 British Columbia act. See § 76 Alberta act. § 82 New South Wales act. § 79 Queensland act. § 122 New Zealand

act. § 162 South Australia act. § 66 Tasmania act. § 57 Victorian act. § 55 Western Australia act.

⁶ § 69 Manitoba act. This power and duty of supervision on the part of the registrar may give to the heirs and devisees of the testator access to the assurance fund, in case he fails to protect their interests properly.

⁷ § 92 Manitoba act.

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of this provision, nor shall such description impose upon any person dealing with such owner the duty of making any inquiry as to the power of the owner in respect of the land or charge or the money secured by the charge, or otherwise; but, subject to the registration of any caution or inhibition, such owner may deal with the land or charge as if such description had not been inserted.”⁸ In the English act of 1875 it was provided that “there shall not be entered on the register, or be receivable by the registrar, any notice of any trust, implied, express or constructive,”⁹ but it was found impracticable to avoid references to trusts on all occasions, and the plan was adopted to permit the entry of trusts on the register when it was necessary to note them, but to prevent the entry from having any effect as notice. Accordingly, the act of 1897 provides that “neither the registrar nor any person dealing with registered land or a charge shall be affected with notice of a trust, express, implied or constructive, and references to trusts shall, as far as possible, be excluded from the register.”¹⁰ In Australasia the estate of a bankrupt or insolvent goes to the official assignee, when he is registered as proprietor of the land, subject to the equities or trusts upon which the bankrupt or insolvent held the land.¹¹

§ 99. Concerning the statutory declaration that no notice of any trust shall be entered on the register, it has been said:

“This prohibition of the entry of ‘notice’ of a trust, or of the ‘trust’ itself, in the register, cannot be construed literally; other parts of the statutes, and also decided cases, are quite inconsistent with any such literal construction. Consistently with the other parts of the statutes, and with the decided cases, entry of a trust or notice of a trust can only mean, in this connection, entry of the names of the beneficiaries and the nature of the interests intended to be conferred on them; the language of the South Australian statute—by which entry is forbidden of the ‘particulars of any trust’—appears to be more accurate than the expression used in the corresponding enacts of the other statutes. Except in Queensland, the statutes do not contemplate the use of the word ‘trustee’ in a trans-

8 § 103 Ontario act.

9 § 83 Land Transfer act, 1875.

10 Schedule 1, Land Transfer act, 1897.

11 § 90 New South Wales act. §

236 Victorian act. § 86 Queensland

act. § 76 Tasmania act. §§ 170, 171,

180 South Australia act. § 234

Western Australia act.

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fer or certificate of title, but there appears to be no reason why it should not be used, and why land should not be expressed to vest in a proprietor 'as trustee', on the analogy of land vested in the representatives of a deceased proprietor.¹² Notwithstanding the omission of the words 'trust' or 'trustee', the fact that land is not vested in joint proprietors for their own benefit may be clearly indicated on the face of the certificate of title in two ways, viz. either by inserting the words 'no survivorship'—thus indicating that the joint proprietors have not full rights of ownership—or by lodging at the registry the instrument by which the trusts are created or declared and protecting it by caveat; and both precautions may be adopted together. * * * In all jurisdictions a distinction is made—with respect to their liability to lapse or removal—between ordinary caveats to prevent dealings, and caveats entered for the protection of trusts. * * * Where the existence of a trust is made to appear on the register, whether by inserting the words 'no survivorship' or by entry of a caveat in the appropriate manner, * * the effect appears to be that a restriction on the power of the proprietor to deal with his estate, amounting to something in the nature of an encumbrance, is created, and the existence of this restriction or incumbrance implies a correlative interest in the persons beneficially entitled, notwithstanding that this interest cannot—under the terms of the statutes—be called a registered interest."¹³

§ 100. Under many foreign acts trusts in land may be declared by any document, or attested copy, by depositing it with the registrar, but the rights incident to any ownership or dealing registered under the act are not declared to be positively affected by the deposit, and such document may not be registered. It is not clear what function this deposit performs, except that under some acts the registrar must be satisfied that any transfer of the land by a trustee is in accordance with the terms of the trust as declared in the instrument so deposited with him. While trusts may not be placed on the register, yet all foreign acts provide for the filing of caveats or cautions which will prevent a new registration unless it be made subject to the rights and interests of the caveator, and in this indirect way, notice of a trust may be given to any per-

¹² The insertion of the words "as trustees" is expressly authorized by the Fiji 1876 Ordinance § 21.

¹³ Hogg, *Australian Torrens System*, pp. 973, 974.

son about to deal with the title. If a beneficiary may file a caveat and give notice of the terms of the trust on the face of the register, the statutory declaration that no notice of a trust may be registered amounts to little in simplifying titles and facilitating transfers. It seems of little moment to declare that the state may give no notice of a trust on the register, though a beneficiary may do so. It is not an essential feature of the Torrens system that no notice of a trust may be registered; it is merely a scheme of most of the foreign acts. In Nova Scotia and in this country apt words must be used to show that the land is held in trust, and a reference must be made to the instrument creating the trust. Of course this method of registration discloses the trust and in many cases calls for a judicial construction of the instrument creating it, but the foreign method of registering the trustee as the absolute owner of the land is not without its difficulties and complications.¹⁴

§ 101. Registration of Trust Estates in this Country. In several of the acts in this country it is substantially provided: If a deed or other instrument is filed with the registrar for the purpose of transferring registered land in trust, or upon any equitable condition or limitation expressed therein, or for the purpose of creating or declaring a trust or other equitable interest therein without the transfer thereof, the particulars of such trust, condition, limitation or other equitable interest shall not be entered on the register, but a memorial thereof may be entered by the words "in trust", "upon condition", or "with limitations" or other apt words, and by reference by number to the instrument authorizing or creating the same. A similar memorial shall be made upon the owner's duplicate certificate. If the instrument which creates or declares the trust or other equitable interest has already been recorded in any public office of this state, a certified copy thereof may be filed with the registrar and registered by him in lieu of the original. If the instrument contains an express power to sell, mortgage or otherwise deal with the land, such power shall be stated in the certificate of title by the words "with

¹⁴ See § 141, post.

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power to sell" or "with power to mortgage" and by apt words of description in case of other powers. No instrument dealing with registered land held in trust shall be registered unless the power thereto enabling is expressly conferred in the instrument of trust, or unless the court has construed the instrument in favor of the power. In such case a certified copy of such decree shall authorize a registration in accordance therewith.¹⁵ An analysis of the provisions of the sections just cited will show many minor differences and distinctions between them, but it is not necessary to consider them all here. We must, however, stop to examine briefly the terms of these sections so far as they relate to the power of the registrar to make a new registration on a transfer by the trustee.

§ 102. In Massachusetts, Hawaii and the Philippine Islands no transfer by the trustee may be made unless the instrument creating the trust gives him the power to deal with the land in the proposed manner, or unless a decree of a competent court has authorized it. In Minnesota, if the instrument declaring the trust contains a power of disposition, the registrar shall register the trustee "with power of sale", "with power to mortgage" etc., but no registration of a transferee from the trustee may be made unless the power is expressly conferred and the court has construed the instrument in favor of the power. Under several acts no transfer of or charge upon or dealing with land registered in trust shall thereafter be registered, except upon an order of court directing such transfer in accordance with the true intent and meaning of the trust.¹⁶ In California, a trustee under any will admitted to probate, unless such power has been expressly withheld by the terms of such will, has power to deal with any registered land held by him in trust as fully in every respect as if such lands belonged to him individually.¹⁷ If, however, the trust is declared by a deed or by any instrument except a will, and such instrument contains the words "with power of sale," the trustee

¹⁵ § 59 Minnesota act. §§ 64, 65 Massachusetts act. §§ 65, 66 Hawaiian act. §§ 65, 66 Philippine act. § 64 Colorado act. § 63 Washington act. §§ 67, 68, 69 California act.

See §§ 64, 65 Nova Scotia act.

¹⁶ § 64 Colorado act. § 63 Washington act. § 59 Minnesota act.

¹⁷ § 70 California act.

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has power to deal with the land as the owner thereof, and a bona fide purchaser is not bound to inquire into or determine whether or not the acts of such trustee are in accordance with the terms and conditions of the trust. When such power is conferred, the registrar shall note upon the register and duplicate certificate the words "with power of sale."¹⁸ If no such power is contained in the instrument, the registrar may make a registration only on an order of court.¹⁹ Under some acts, registration based on an order of court directing it to be made is conclusive evidence in favor of the new registered owner that a transfer, charge or other dealing is in accordance with the true intent and meaning of the trust, condition or limitation.²⁰

§ 103. In Oregon, when land has been registered "in trust", "upon condition" or "with limitations", no dealing with the land may be registered thereafter, unless pursuant to the order of some court, or the filing of an affidavit of the person applying for the registration that such dealing is in accordance with the true intent and meaning of the trust, condition or limitation. Registration based on such an affidavit is made conclusive evidence that it is in accordance with such intent and meaning.²¹ In Illinois, when land has been registered "in trust", "upon condition" or "with limitations," no dealing with it may be registered thereafter, unless pursuant to the order of some court, or upon the written opinion of two examiners that such dealing is in accordance with the true intent and meaning of the trust, condition or limitation. Registration based on such written opinions is made conclusive evidence that it is in accordance with such intent and meaning.²² In a case involving the constitutionality of the act,²³ the supreme court of Illinois considered the sections just cited,²⁴ and said:

"If the registration be made pursuant to the order or finding of a court of competent jurisdiction the acts of the registrar are purely ministerial, but, if made upon the opinion of the two

¹⁸ § 68 California act.

¹⁹ § 69 California act.

²⁰ § 63 Washington act. § 64

Colorado act. § 59 Minnesota act.

§ 69 California act. § 69 Illinois

act. § 68 Oregon act.

²¹ §§ 67, 68 Oregon act.

²² §§ 68, 69 Illinois act.

²³ *People v. Simon*, 176 Ill. 165;

52 N. E. Rep. 910; 68 Am. St. Rep.

175; 44 L. R. A. 801 (1898).

²⁴ §§ 68, 69 Illinois act.

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examiners, he is required to exercise a judgment of his own. These duties do not differ materially from those already examined, except that here the decision is made conclusive, in favor of the person taking the transfer in good faith and for a valuable consideration, that the transfer or charge is in accordance with the true intent and meaning of the trust, condition or limitation. This does no more than abrogate the rule in equity which requires the purchaser of trust property to see to the application of the purchase money, and the inclination of courts now is to withdraw from that rule. * * * This statute also changes the rule of law as to notice. We know of no reason why the legislature might not change either or both of these rules without violating the constitution. Certainly, as to the future all trusts could be entirely abolished by the legislature, as was done in cases of uses by the statute of uses. As the law now stands, cases frequently arise in which bona fide purchasers take property free from existing trusts, and are not held bound to see to the application of the consideration."

This exposition of these sections does not seem to meet the questions which arise under them. The legislature may abolish trusts in land, may abolish the rule that a purchaser must take notice of an express trust in land, and still preserve the whole scheme of trusts as between the parties to them, and may abolish the rule that a purchaser must see to the application of the purchase money to the purposes of the trust. But in these sections the legislature says nothing about abolishing trusts in registered land, or nothing about the rule as to the application of the purchase money; and it does in apt words provide that notice of trusts, conditions and limitations must be given, and states the only methods according to which registered land may be dealt with after such notice is given. The question is concerning the validity of one of the methods provided for. According to it power is delegated, in cases as they arise, to the registrar and two examiners of titles to determine whether a proposed dealing with land registered in trust, on condition, or with limitations is in accordance with the true intent and meaning of such trust, condition or limitation. In Oregon the power to determine whether a proposed dealing with land so registered is in accordance with such true intent and meaning is delegated to the purchaser of the land so registered, and he is to settle the question by making an affi-

davit that it is. The validity of these portions of these sections must be left to the determination of the courts in cases in which it is directly involved. It is submitted that these portions are unconstitutional because they give to the registrar and examiners in Illinois, and to the person making the affidavit in Oregon, the power to adjudicate upon the rights of parties and to apply the law. While legislatures may abolish future trusts, they may not recognize trusts, and confer on non-judicial officers and other persons the power to pass on the validity of transfers under the terms of trusts, whether in registered or in unregistered land. Any new registration made according to the methods under consideration will be valid if made according to the true interpretation of the terms of the trust, but it will be invalid if the registrar and the examiners in one case, and the person making the affidavit in the other case, make an error of law in such interpretation, and it may be set aside by any interested person, no matter how many subsequent registrations may have been made. In future interpretations of Torrens statutes in this country, courts must decide whether the statutory declarations are valid, which say that certain proceedings by the registrar, and certain acts by other persons, shall be conclusive evidence of title. It is plain that up to this time these questions have not been met, when they have arisen.

§ 104. There is certainly a distinction, and perhaps a legal difference, between the Illinois and Oregon acts and the California act. In the latter there is no delegation of power to the registrar or to any other person to determine, in cases as they arise, whether a trustee has a power of sale, but there is a legislative declaration that "if the instrument contains the words 'with power of sale' the trustee shall have the power to deal with the land as the owner thereof; and a bona fide purchaser, mortgagee or lessee is not bound to inquire into or determine whether or not the acts of the trustee are in accordance with the terms and conditions of the trust."²⁵ That part of the opinion and argument of the supreme court of Illinois just quoted would seem to apply to this statutory declaration,

²⁵ § 68 California act.

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and not to the provisions of the section of the Illinois act, which the court had under consideration. This statute changes the general rule that a power to sell does not include a power to mortgage and it also changes the rule that a purchaser must see that a trustee acts in accordance with the terms and conditions of his trust. A legislature in this country undoubtedly has power to change these rules for the future, but it does not follow that it has power to give to a ministerial officer, or to a person dealing with the land, the right to determine whether a trustee is acting within the terms and conditions of a trust. In examining the section of the California act, just quoted, it is natural to inquire whether the instrument must contain the exact words "with power of sale", in order to bring about the effect of the statutory declaration, or whether this may be effected by the use in the instrument of the words "with power to sell", or by the use of words which give a power of sale by necessary implication. When a section of an act contains such a formulary phrase, it is impossible to tell, until a judicial construction has been given to it, whether the language is used in a technical or in a broad and general sense.

§ 105. In the New York act there are no special provisions relating to the registration and transfer of property held in trust, on condition or with limitations. It is apprehended that under this condition of the law, a registration of a trust estate must set forth the terms of the trust in a substantial manner and must refer to the instrument creating the trust. Under this act no transfer of land may be made by the registrar unless the parties thereto agree upon a written statement to be entered on the register. It is doubtful whether a trustee may enter into such an agreed statement without statutory authority to do so, and it is probable that a trust estate may be transferred only by direction of a court.

§ 106. **General Review of Trust Estates.** From this review of the acts, so far as they relate to trust estates, it is evident that, with the exception of the act of Nova Scotia, the foreign acts abolish notice of the particulars of trusts to bona fide purchasers of registered land, and provide that with purchasers of registered land trustees have power to deal as the owners

thereof. But under the acts in this country such notice is not abolished, and a purchaser from a trustee, except under special circumstances in California, must determine at his peril whether the trustee has power to deal with the land in the manner proposed, and, if he has no such power, must insist that the transfer be made pursuant to an order of court. The effect of some of our acts may be to do away with the necessity on the part of the purchaser of seeing to the application of the purchase money, where a power of sale is given in the instrument and shown on the register, but this effect arises from implication, if at all, and is not entirely clear. Under foreign acts, while no notice of a trust may be placed on the register by the state, such notice may be given by the filing of a caveat by an interested person, and a purchaser is bound by the notice thus given.

§ 107. Mortgages, Original Registration. In Ontario a mortgagee having a power of selling land may apply to have the mortgagor or other person owning the equity of redemption registered as owner with any title, absolute, qualified or possessory. The costs and expenses properly incurred by the mortgagee in or about the application are ascertained and declared by the master of titles, are deemed to be costs and expenses incurred in pursuance of the power, and may be collected by him as a part of the debt secured by the mortgage.²⁶ In England, a mortgagee having a power of selling land may apply to be registered as first proprietor with any title, with the consent of the persons, if any, whose consent is required to the exercise by the applicant of his power of sale; and the costs and expenses, having been ascertained and declared by the registrar, become a part of the debt secured by the mortgage.²⁷ In Ontario, on the registration of a proprietor of land with absolute or qualified title, any incumbrance on the property is entered on the register, but on registration of the proprietor with possessory title only, any incumbrance on the property may or may not be noted on the register, according to the proof of title made before the registrar, or according to his discretion. The

²⁶ § 8 Ontario act.

²⁷ § 68 English act, 1875.

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purpose of registration with possessory title is not to declare or establish his title, but is to vest him with such title as he may have at the date of registration. This was formerly the rule in England, but now the incumbrances must be shown on the register. In Manitoba, when land subject to a mortgage is brought under the act, all rights, remedies and matters of contract under the mortgage remain intact, as if the land were still unregistered.²⁸ In Australasia a mortgagor may not bring his land under any of the acts unless his mortgagee joins in or consents to the application.²⁹ Under the Victorian land transfer act,³⁰ the proprietor of land may apply for registration, "provided always that a mortgagor shall not be entitled to make such application unless the mortgagee shall consent thereto". But it seems that in Victoria it is the practice to bring the equity of redemption under the act, even though the mortgagee may refuse to consent to the registration. When this is done, in the certificate of title issued to the mortgagor, the mortgage is set out as an incumbrance, and the rights of the mortgagee are declared to be unaffected by the bringing of the equity of redemption under the act. The land, so far as dealings by the mortgagee are concerned, remains under the general law. On a sale of the land by the mortgagee under his power of sale, the land becomes unregistered, and an application is necessary to bring it again under the act. The acts of Massachusetts, Hawaii, the Philippine Islands and Nova Scotia do not require the consent of the mortgagee to the registration of the land on which he holds the lien, but it protects him from any effect or consequence which may flow from such registration by the owner without his consent. The Massachusetts act provides: "If the holder of a mortgage does not consent to the making of the application, it may be entered nevertheless and the title registered subject to the mortgage, which may be dealt with or foreclosed as if the land subject to it had not been registered. The decree of registration in such case shall describe

28 § 31 Manitoba act.
 29 § 14 New South Wales act. §
 18 New Zealand act. § 28 South
 Australia act. § 16 Queensland act.

§ 4 Tasmania act. § 20 Western
 Australia act. § 21 Victorian act.
 30 § 21 Victorian act.

the mortgage, and shall state that it has not been registered and that registration is made subject to it, and shall provide that no subsequent certificate shall be issued and no further papers registered relative to such land after a foreclosure of such mortgage.''³¹ In Massachusetts, Hawaii and the Philippine Islands the mortgagor may register the whole title with the consent in writing of the mortgagee, but as the decree for registration becomes effective at once and may not be set aside as against an innocent purchaser for value, it is incumbent on the consenting mortgagee to see that the decree properly describes his mortgage and fixes the priority of his lien. In Nova Scotia an appeal must be taken within three months or the decree is conclusive.

§ 108. Mortgages, Original Registration. In the other acts in this country it is provided that it shall not be an objection to bringing land under the act, that the estate of the applicant is subject to any outstanding lesser estate, mortgage lien or charge, but any such lesser estate, mortgage, lien or charge shall be noted on the certificate of registration when issued.³² This provision has been the subject of much criticism and dissatisfaction. It is claimed, and it may be true, that in Massachusetts large financial companies and large loaners of money are pleased to make loans on registered lands, but it is also true that many financial institutions and many large money loaners throughout the whole country are unwilling to do so. This unwillingness may arise from prejudice against a new system of dealing with land, from a lack of knowledge of the system, or from a feeling that a new and unknown system of registration detracts from the value and merchantability of land placed under it. Those who do not care to loan money on registered land are not pleased with the thought that the owner of mortgaged property, without the consent of the mortgagee, may involve the title in litigation, place it under a system of registration about which they are doubtful, and

³¹ § 18 Massachusetts act, being original § 19 as amended. § 19 Hawaiian act is substantially the same, being a copy of original § 19 Massachusetts act. Part of § 19, Philippine act is substantially like

the Hawaiian act. § 9 Nova Scotia act.

³² § 9 Illinois act. § 7 Oregon act. § 8 California act. § 2 Colorado act. § 4 Minnesota act, 1905. § 10 New York act. § 2 Washington act.

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perhaps compel them on foreclosure of the mortgage to take title to registered land. Applicants for registration of title have reason to complain of the provision. Trust deeds and mortgages usually provide that if the trustee, or the owner of the indebtedness, is made a party to any litigation concerning the land covered by the instrument, he shall be paid a reasonable sum for the services of his attorney and shall be reimbursed for any necessary costs expended by him. When the mortgagee is made a party to a proceeding for registration of the title, he employs an attorney who appears and looks after his interests. When the applicant is required to pay these expenses, he is apt to find fault with this provision of the law. If, however, the trust deed or mortgage does not provide for the payment of such expenses by the owner of the land, the mortgagee may be heard to complain that the law subjects him to expense at the discretion and will of the owner of the land. A mortgagee must be made a party to a proceeding in registration of the whole title, and whether he appears voluntarily or after service of process, he is bound to present his interests and to see that his rights are correctly defined in the decree of the court. While in any given case the proceeding in registration may not be brought for the purpose of affecting the status or amount of any mortgage on the property, yet the proceeding is essentially adversary, is governed by all the rules which obtain in chancery and civil cases, and binds all interests as they are determined and set forth in the decree. During its progress many things may happen by mistake or omission, which will affect the rights of some of the parties, and one takes the risk of suffering loss, or of being placed at a disadvantage, if he turns over his interests to be looked after by some other party to the action. An application for registration was made in Chicago,³³ and the mortgagee was made a party defendant. After he was served with process, he was assured that the purpose of the action was to register the title and not to affect his interest, and he concluded that it was safe to let the title be registered in due course, without

³³ Application No 448, filed November 25, 1901, decree entered January 14, 1902; new decree en-

tered May 15, 1902, correcting the amount of the mortgage.

having anyone to represent him. A decree was entered establishing the title, subject to his mortgage, which was described as for \$1000. and a certificate was issued to the owner of the land in accordance with the decree. Some weeks afterward the registered owner took the certificate back to the registrar's office and asked that it be corrected, explaining that he had just discovered that the mortgage was described as being for \$1000. when it was in fact for \$8000. The mortgagee had never looked into the proceeding, and was entirely ignorant of the mistake. After the expiration of the limitation of two years in that state, he could have enforced his mortgage against the land for \$1000 only, as stated in the decree, and would have been relegated to an action on the note for any remainder of the debt due him.³⁴

§ 109. Mortgage on Registered Land. A mortgage on registered land may be executed in duplicate so that one copy may be retained in the registrar's office, and one copy marked "mortgagee's duplicate" may be delivered to the mortgagee. If it is not executed in duplicate, the original mortgage is filed and retained in that office, and the registrar may make and give to the mortgagee a "mortgagee's certified copy."³⁵ The mortgage is not recorded, but when it is filed in the registrar's office, he makes a note of it on his list of filed papers, and enters on the proper page of the register,—the last page which has been set apart for that particular tract of land,—and also on

³⁴ See post, § 194. See § 51, ante.

³⁵ §§ 62 and 63 Illinois act. §§ 61 and 62 Oregon act. §§ 61 and 62 California act. § 60 Massachusetts act. § 61 Philippine act. § 61 Hawaiian act. § 56 Washington act. § 57 Colorado act. § 53 Minnesota act, 1905. The New York act does not provide for the issue of mortgagee's duplicates, but there is no reason why they may not be issued when required. An owner gave a mortgage on several tracts of land, one of which was registered under the Torrens law. The mortgage was recorded as document number 3,409,543 in the recorder's office in Chicago at a cost of \$2.45, and was then, at a cost of \$3.00 filed with

the registrar of titles for the entry of a memorial of the instrument against the title of the registered land. The mortgagee was not entitled under the Torrens law, to the possession of the original mortgage, so he requested the owner to procure for him a certified copy of the instrument to place with his papers. The registrar charged \$5.60 for the certified copy. This incident shows clearly the annoyance and expense which dealers with lands will be put to when two systems of conveyancing are administered in the same state and both systems are largely used: Many similar incidents may be cited.

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the owner's certificate, a memorial of the purport of it, the date of filing and a reference to it by its file number. It is a lien on the land from the time of the entry of the memorial. When the mortgage is released, the registrar cancels the memorial and stamps across the mortgage on file and across the mortgagee's duplicate or certified copy the word "cancelled." The Torrens acts provide that "all instruments, notices and papers required or permitted by this act to be filed in the office of the registrar shall be retained and kept in such office."³⁶ The original mortgage is a perpetual deposit in the office of the registrar. When it is paid it is marked "cancelled" and put back among the files. The original notes are held by the owner of the indebtedness, and as they are paid they are surrendered to the owner of the land. In this country it has been customary to surrender the mortgage to the owner of the land when the debt is paid, and the retention of it by the registrar, even after it is cancelled, has caused contention now and then; but there is no real cause for dissatisfaction in this method of dealing. In this country it is generally provided in express terms or by necessary implication, that a trust deed in the nature of a mortgage shall be deemed to be a mortgage and shall be subject to the same rules as a mortgage.³⁷ A trust deed assumes to transfer land to a transferee as security for a debt, and in some jurisdictions, where no entry of a trust may be made on the register, the registrar will not register such an instrument as a mortgage, and will only register it as an absolute transfer of the land to the grantee as the absolute owner.³⁸ The Australasian acts prescribe a statutory form of mortgage and provide that a mortgage is a mere security for the debt and not a transfer of the land. A mortgage confers an interest, but not an estate.³⁹ Where a mortgagee does not take a

³⁶ § 51 Illinois act. § 50 Oregon acts. § 51 California act. § 47 Colorado act. § 46 Washington act. § 143 British Columbia act. § 46 Saskatchewan act. § 23 Alberta act. § 48 Nova Scotia act. Rule 52 Ontario act. Rule 162 English act.

³⁷ § 60 California act. § 61 Illinois act. § 60 Oregon act. § 59 Massachusetts act. § 57 Colorado

act. § 60 Hawaiian act. § 47 New York act. § 56 Washington act. § 52 Minnesota act, 1905.

³⁸ Such is the rule in Canada.

³⁹ §§ 113, 114 Victorian act. §§ 3, 56, 60 Queensland act. §§ 128, 132 South Australia act. §§ 2, 93, 94 New Zealand act. §§ 3, 56, 57 New South Wales act. §§ 3, 52, 53 Tasmania act. §§ 105, 106 West-

legal estate in the land he may be under some disadvantage; he will not be able to maintain ejectment. But the Torrens acts give him power, on default, to enter, to foreclose and to sell, and he is not likely to find himself in serious difficulties. The entry of the memorial on the register refers to the mortgage in a brief manner, and the original may be inspected for the particulars contained therein. In England a certificate of title or a certificate of charge may be deposited as a security, and a lien will be created which, subject to any registered estates, charges or rights, is equivalent to that created by a deposit of title deeds. Notice of the deposit may be entered on the register, and when so entered it will operate as a caution.⁴⁰

§ 110. In some jurisdictions a mortgagee or chargee is entitled to a certificate showing his interest in registered land,⁴¹ but, generally speaking, a mortgagee or chargee is not entitled to any such certificate. Unless there is a valid indebtedness to be secured by the mortgage or charge, the mere registration of a memorial of it does not make it a lien on the property. There is no warranty on the part of the state that the memorial constitutes a lien. The question of the validity and extent of the lien of the memorial is left open, to be determined in any proper proceeding which may be brought to contest it. The certificate states the ownership of the title, and the effect of the entry of the memorial on it is to certify that there are no prior liens on the title, except the statutory incumbrances and such as may be set forth therein. It is so in title insurance. The insuring company does not guarantee that all the contractual relations between the parties have been carried out, and that the mortgage with respect to which the policy is issued is a valid lien; it merely guarantees that the ownership of the title to the pledged estate is as stated in the policy, and that there are no prior liens or incumbrances on the title except such as may be scheduled in the policy. The main object of a certificate is to state that the holder of it is entitled to the interest with which he is registered, and the fact that a mortgagee's certificate does not do this in a broad sense is probably

ern Australia act. See also § 102
Saskatchewan act. § 61 Alberta act.
§ 100 Manitoba act.

⁴⁰ § 243 English rules, 1908.
⁴¹ 40 Act for Ireland, 1891. §
259 English rules, 1908.

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the reason why no such certificate is issued in most jurisdictions. It is not unusual for a mortgagee to insist that he shall hold the owner's duplicate certificate during the existence of the lien of the mortgage. Concerning this custom it has been said: "The necessity for producing the main certificate of title, for the purpose of effecting registration of some transaction, with a subsidiary interest, occasionally causes great inconvenience. Since a mortgagee usually insists on having possession of his mortgagor's certificate of title,⁴² and since a lessee cannot usually have a separate certificate of title, any transactions by the mortgagor with the mortgaged land, or by the lessee with his own estate, necessitate the concurrence of the mortgagee or the lessor, in order that the certificate of title may be produced at the registry. In Victoria and Western Australia⁴³ it is expressly enacted that a mortgagee who holds the mortgagor's certificate of title must produce it (though at the mortgagor's cost) at the registry for the purpose of registering transactions subsequent to the mortgage; and this provision overrides any express stipulation in the mortgage instrument that the mortgagee shall keep possession of the certificate of title during the continuance of the security.⁴⁴ If the certificate of title is actually lying at the registry, though for another purpose, the mortgagee cannot insist on being paid a fee for its production, but a second mortgagee is entitled to have his mortgage duly registered and entered on the certificate of title.⁴⁵ It has, however, also been held that the registry officers have not ipso facto authority to make entries on a certificate of title which has been produced for an entirely different purpose."⁴⁶ In some of the Canadian acts it is provided that when any mortgage or incumbrance is registered thereunder, the registrar shall retain possession of the duplicate certificate of title on behalf of all persons interested in the land described in the instrument, and that, if desired, the registrar shall furnish to the owner of the mortgage or incumbrance a certificate of charge.⁴⁷

§ 111. In the Australasian acts provision is made that there shall be an implied covenant on the part of a transferee of in-

⁴² Under the English Land Transfer Acts a separate certificate of charge is given to the mortgagee.

⁴³ V. 1890, s. 134, W. A. 1893, s. 127.

⁴⁴ In re Armitage (1891) 17 V. L. R. 77.

⁴⁵ In re Wright (1894) 12 N. Z. R. 585.

⁴⁶ Citing Ex parte Bettie (1895). 14 N. Z. R. 129. Hogg, Australian Torrens System, p. 923.

⁴⁷ § 101 Saskatchewan act. § 71 Alberta act. § 118 Manitoba act.

cumbered registered land that he will indemnify the transferror against any mortgage or charge on the land. It seems that in some jurisdictions this covenant is not an agreement in favor of the mortgagee or chargee that the transferee will pay the debt, but is an agreement of indemnity with the mortgagor.⁴⁸ Any such implied covenant is detrimental to active dealing in real estate. Parties to a dealing in land may well be left to form their own agreements as to the payment of incumbrances thereon, and it does not seem wise or expedient to make a general statutory covenant on such a subject. But an implied statutory covenant may be modified or entirely done away with by the agreement of the parties.⁴⁹

§ 112. Under registration acts the doctrine of equity prevails that, where the mortgagor has no notice of the transfer of the mortgage, payments made by him to the original mortgagee, subsequent to the transfer on the register, are to be deemed as payments made to the transferee. Registration of the transfer of a mortgage under the act is not a substitute for notice to the mortgagor of such transfer.⁵⁰ The rights of a mortgagee of registered land may be barred by lapse of time, where the debt is extinguished under a statute of limitations.⁵¹

§ 113. **Foreclosure of Mortgage.** In this country the acts provide that mortgages and charges upon registered land may be foreclosed in the same manner as mortgages upon unregistered land, except that until notice of the pendency of any suit to foreclose or enforce the lien is filed in the registrar's office, and a memorial thereof is entered on the register, the pendency of such suit shall not be notice to the registrar or to any person dealing with the land.⁵² Under some acts regis-

⁴⁸ Hogg, Australian Torrens System pg. 920.

⁴⁹ § 80. New South Wales act. § 90 Tasmania act. § 76 Queensland act. § 262 South Australia act. § 158 New Zealand act. § 157 Victorian act. § 131 Western Australia act. Wellington Ry. v. Registrar-General, 18 N. Z. L. R. 250 (1900). Staples v. Corby, 19 N. Z. L. R. 517 (1900).

⁵⁰ Nioa v. Bell, 27 V. L. R. 82 (1901). Future advances may not

be made after express notice in writing of the equities of others. § 77 Act for Ireland, 1891.

⁵¹ Shirley v. Tapper, 23 N. Z. L. R. 849 (1904). See Belize Estate Co. v. Quilter, 1897 A. C. 367. P. C.

⁵² § 55 Minnesota act. § 66 Illinois act. § 65 California act. § 65 Oregon act. § 59 Colorado act. § 58 Washington act. § 52 New York act. § 62 Massachusetts act. § 63 Hawaiian act. § 63 Philippine act. § 58 Nova Scotia act.

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tered land may be sold by advertisement or under a power of sale contained in the mortgage.⁵³

§ 114. Deed on Foreclosure, New Certificate. In the Minnesota act there is the following provision: "Any person who has, by an action or other proceeding to enforce or foreclose a mortgage, lien or other charge upon registered land, become the owner in fee of the land, or any part thereof, may have his title registered. He shall apply by duly verified petition to the court for a new certificate of title to such land, and the court shall thereupon, after due notice to all parties in interest and upon such hearing as the court may direct, make an order or decree for the issuance of a new certificate of title to the person entitled thereto, and the registrar shall thereupon enter a new certificate of title to the land, or to the part thereof to which the applicant is entitled, and issue an owner's duplicate, as in case of a voluntary conveyance."⁵⁴ In Colorado no new certificate of title may be issued to one who has obtained a deed under a proceeding for foreclosure, except upon filing in the office of the registrar an order of the district court of the county directing the entry of such new certificate.⁵⁵ The applicant must petition the court for a new certificate, setting forth the facts, and, after notice to all parties in interest, the court may make such an order as the applicant is entitled to. In some other jurisdictions, in case of foreclosure by entry and possession, the mortgagee or his assigns must petition the court and obtain an order for a new certificate, before it may be issued.⁵⁶ It is evident that these provisions were enacted in order to escape from any suggestion that, in issuing a new certificate vesting the title in the holder of the deed obtained under the foreclosure, the registrar is exercising judicial authority. It is worthy of note that while the New York act provides for a reference to the court in case the parties to a voluntary instrument do not agree upon a statement as to the entry to be made on the register, it does not provide for an order of court as authority for the issue of a new certificate to one

⁵³ § 55 Minnesota act. § 62 Massachusetts act. § 63 Hawaiian act.

⁵⁴ § 56 Minnesota act.

⁵⁵ § 61 Colorado act. See also §

60 Washington act. § 87 Oregon act. § 88 Illinois act.

⁵⁶ § 62 Massachusetts act. § 63 Hawaiian act.

claiming title through a judgment or decree of sale. In some acts it is provided that nothing contained therein shall prevent the mortgagor or other person in interest from directly impeaching, by bill in equity or otherwise, any foreclosure proceedings affecting registered land, prior to the entry of a new certificate of title.⁵⁷ This provision is in the nature of a statute of limitation. The general laws of most states, concerning the foreclosure of mortgages, might be vastly improved by a suitable provision that no proceeding to review or to question the sufficiency of a foreclosure proceeding should be brought by any party to the suit after the record of the deed issued on a sale pursuant to the decree. After an order confirming the sale, on a judicial proceeding in foreclosure, and the issue of a deed, the purchaser is entitled to a new certificate.⁵⁸ In Nova Scotia, on production of the sheriff's deed issued pursuant to the sale on the decree of foreclosure, a new certificate is issued to the grantee,⁵⁹ but in other provinces no sale of land by a sheriff or other officer under process of law shall be of any effect until it has been confirmed by the court or a judge.⁶⁰

§ 115. Charge, Encumbrance, Mortgage. The word "charge" is generally used in a broad sense to mean any security in land for the payment of money, whether by way of annuity or mortgage, but it may be used in a narrower sense to mean any security in land for the payment of money, except a mortgage. The word "encumbrance" may be used in a broad sense to include all lesser and prior interests which may be noted on the register, but in a narrower sense it means any charge on land created for the purpose of securing the payment of an annuity or sum of money, other than a debt. A mortgage is any charge on land created merely for securing a debt. A life estate in registered land may be treated as an encumbrance, and not as an estate in land.⁶¹ Charges and encumbrances in invitum are effected through the registration of judgments, decrees and executions.

⁵⁷ § 62 Massachusetts act. § 63

Hawaiian act. § 63 Philippine act.

⁵⁸ § 62 Massachusetts act. § 88

California act. § 63 Philippine act.

⁵⁹ § 58 Nova Scotia act.

⁶⁰ § 79 Alberta act. § 129 Saskatchewan act.

⁶¹ §§ 18, 19 Ordinances for Fiji Islands.

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§ 116. Judgments, Attachments, Liens. Under the plan of the Torrens system any claim of lien on, or writ or process against, registered land must be entered on the last register of the title, in order to become a lien on the land or to affect the title. It is provided that no judgment or decree or order of any court shall be a lien upon or affect registered land or any estate or interest therein, until a certificate, under the hand and official seal of the clerk of the court in which the same is of record, stating the date and purpose of the judgment, decree or order, or a certified copy of such judgment, decree or order, is filed in the office of the registrar, and a memorial of the same is entered on the register of the last certificate of title to be affected.⁶² In some acts it is provided that whenever registered land is levied on by virtue of any writ, a memorial of the fact must be entered on the register, and that no lien shall arise by reason of such levy until such entry is made, any notice thereof, actual or constructive, to the contrary notwithstanding.⁶³ In other acts this idea is more directly expressed where it is provided that no proceedings under any writ shall be valid as against a purchaser for value before such entry is made, notwithstanding he may have had actual or constructive notice of the writ.⁶⁴ The general scheme is that no statutory or other lien shall be deemed to affect a registered title until after a memorial of it has been entered on the register. In California an exception is made in case of a lien for labor performed for a corporation, as provided for in a certain act.⁶⁵ The California act seems to be the only one in this country which specifically provides that special assessments for public improvements shall be filed with the registrar against the land, in order to create a lien. Whenever any lien arises adversely to the title of the

⁶² 85 Illinois act. § 84 Oregon act. § 70 Colorado act. § 61 Minnesota act. § 91 California act. § 69 Washington act. § 49 New York act. § 70 Massachusetts act. § 71 Hawaiian act. § 71 Philippine act. See also § 53 English act, 1875. § 75 Ontario act. § 85 Manitoba act. § 110 British Columbia act. § 77 Alberta act. § 129 Saskatchewan act. § 59 Nova Scotia act. § 139 Victorian act. § 105 New South

Wales act. § 91 Queensland act. § 105 South Australia act. § 16 Tasmania act, 1893. § 133 Western Australia act.

⁶³ § 86 Illinois act. § 85 Oregon act. § 92 California act.

⁶⁴ § 64 Ontario act. § 105 New South Wales act. § 106 South Australia act. § 16 Tasmania act, 1893. § 133 Western Australia act. § 139 Victorian act.

⁶⁵ § 95 California act.

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registered owner without voluntary action by him, and not in pursuance of a judgment or decree of court, the registration of it is not conclusive of the regularity or validity of any proceedings or instruments by means of which such lien arose, and the registered owner may contest the validity of such lien.⁶⁶ But this doctrine may not apply under foreign acts. It may be that the registration of a writ of execution is conclusive as to the validity of the proceeding under which it was issued. It may be that he acts judicially in making the notation of a writ on the register, and that no question may be raised as to the validity of the writ, or as to the filing of the writ as a memorial against the right land. There seem to be no decisions of courts in foreign jurisdictions throwing light on these matters. In one case a registrar by mistake noted the lien of an execution against registered land belonging to a registered owner of the same name as the execution defendant, and the sheriff sold this land to the execution creditor, who registered the sheriff's deed and became the registered owner. It was held that on the noting of the writ, the sale of the land thereunder, and the registration of the sheriff's deed, the certificate of the real owner was superseded, and that he was deprived of his land in consequence of the error.⁶⁷ It is not possible to lay down broad principles of registration from the facts and decision in this case, and there is no line of cases founded on or collateral to it. After the issuance of a deed on any sale to satisfy a judgment or order of court in this country, a new certificate of title may be issued to the purchaser on substantially the same terms and conditions as in case of the foreclosure of a mortgage. A lien may be released at any time on the filing of the certificate of the proper officer or person.

A statute provided that a registered judgment should be a lien on the land of the debtor, and a registration act provided that no instrument should pass any estate in land, either at law or in equity, until it was registered. In April, 1907, execution creditors registered their judgment against the lands registered in the name of their debtor. In January, 1906, the debtor

⁶⁶ § 105 California act.

380; 3 A. L. T. 38 (1881).

⁶⁷ *Hassett v. Bank*, 7 V. L. R. L.

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had transferred a certain lot to a person who, through ignorance of the registry laws, neglected to register his transfer until August, 1907, when he found this judgment registered against the lot which he had purchased. He brought a suit to set aside the cloud of the judgment, and the court below held that registration of a transfer was a *sine qua non* to the passing of any title, but on appeal it was held that according to the act concerning the lien of judgments, the judgment creditors had a lien only on the land of the debtor, and that the debtor, having transferred the lot before registration of the judgment, was a dry trustee for plaintiff who was entitled to remove the cloud.⁶⁸

Whenever the laws of a state require the judgment or decree of a state court to be registered, recorded, docketed or indexed in a particular manner, or in a certain office or county, before a lien shall attach, and those laws authorize the judgments and decrees of the federal courts to be so registered, recorded, docketed or indexed, then the judgments and decrees of the United States circuit and district courts are liens on real estate within that state, in the same manner and to the same extent and under the same conditions only, as if they had been rendered by a court of general jurisdiction of that state.⁶⁹ But, if the clerk of the United States court be required by law to have a permanent office and a judgment record, open at all times for public inspection, in such county, this general principle must not be construed to require the docketing of a judgment and decree of the federal court, or the filing of a transcript thereof, in any state office within the same county in which the judgment or decree is rendered, in order that such judgment or decree may be a lien on any property within such county. It is evident that in New York City, Boston, Chicago, St. Paul and several other places, transcripts of judgments of the federal courts need not be filed in the Torrens offices and entered on a certificate of title, in order to be a lien on registered land in the respective counties where they are situated, and that unless a special search is made for judgments in

⁶⁸ *Entwisle v. Lenz*, 14 British Stat. 358. Act Mar. 2, 1895. c. 180, Col. Repts. 51 (1908).
⁶⁹ Act. Aug. 1, 1888 c. 729, 25 28 Stat. 814.

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the federal courts, there can be no assurance that the title is not subject to a judgment of a federal court. Of course, the federal statutes may be changed at any time so as to require transcripts of judgments to be filed and entered under Torrens acts, in order to be liens on registered lands.⁷⁰

⁷⁰ Concerning judgments, See post §§ 156, 177, 214, 220.

CHAPTER X·

Caveats, Possession and Transmission of Land.

§ 117. **Caveats, Cautions, Notice of Adverse Claims.** The policy of acts for the registration of titles is, that when once registration is affected, the holder of a certificate of title shall have a good title, whether he had notice of outstanding equitable interests or not. In order that hardship may not be suffered by a diligent holder of an equitable interest adverse to a registered owner, and in order that such holder may have an opportunity to present his claim to a person who may be about to deal with the land, such acts provide for the notation on the register of caveats, cautions or notices of adverse claims. The whole scheme of caveats, cautions or notices is to prevent a person dealing with the land from obtaining a clean certificate while any rights are outstanding in others. Until a transfer is actually registered a person having an equitable interest in the property, by having a caveat entered, can stop the issue of a clean certificate. A caveat under most of the acts is a notice to the registrar that the caveator claims a specified estate or interest in the land described in a certain certificate, and it forbids the registration of any person as transferee and of any instrument affecting the title, unless such registration be expressly subject to the specified claim of the caveator. While in theory a caveat is directed only against any subsequent transfer of the property, yet in practical effect it clouds the title of the registered owner, and a person may not lodge a caveat unless he has some legal or equitable interest in the land, which he may urge against the registered owner. Each act must be consulted in order to determine what rights

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may be made the subject of a caveat, caution or notice of adverse claim. In Australasia, where caveats are used very frequently, there has been a great deal of judicial legislation on the subject of the capacity of persons to lodge caveats for the protection of their interests, and on the subject of the sufficiency of the interest to entitle the holder to lodge a caveat. Case after case arising under the registration acts contains a ruling concerning the entry of a caveat, but these rulings arise from the technical language of the different acts, from the local conditions affecting titles and from the particular methods of dealing with lands and land titles, and they give little light for our guidance under our laws. Some cases, however, suggest points which may be of interest. The owner of an easement has no caveating power.¹ A judgment creditor may enter his judgment as a memorial on the register, but he has no caveating power.² A wife may file a caveat against land registered in the name of her husband, to protect her interest therein, where she alleges that the land was purchased with her money held by him upon trusts not committed to writing.³ A person may enter a caveat to protect his interest, where he claims a right to specific performance of a contract by the registered owner to sell the land to him.⁴ A caveat may be entered by a person who claims to be entitled to land erroneously included in the certificate of a registered proprietor, where the caveator had no notice of the granting of the original certificate.⁵ Under special circumstances a registered owner of land subject to a mortgage is entitled to lodge a caveat against a dealing by the registered mortgagee.⁶ While the filing of a caveat is the mere act of a person, and not of a court, it nevertheless in legal effect bears an analogy to a writ of injunction, and is an expeditious and inexpensive method of protecting rights in land under the system.⁷ As a general principle it may be said that a caveat

¹ *Lean v. Maurice*, 8 S. A. L. R. 119 (1874).

² *In re Palmer*, 5 S. A. L. R. 80 (1871).

³ *D'Albedyhll v. D'Albedyhll*, N. Z. L. R. 3 S. C.391 (1885).

⁴ *In re Thomson*, ex parte Findlay, N. Z. L. R. 5 S. C. 52.

⁵ *Ex parte Solling*, 14 N. S. W. L. R. (L.) 399 (1893).

⁶ *Davies v. Herbert*, 11 V. L. R. 386; 6 A. L. T. 197 (1885).

⁷ *McEacharn v. Colton*, 1902 A. C. 104. *Davis v. Wekey* 1 V. L. R. 1 (1870).

may be entered in any case where a court will issue an injunction to prohibit the registered proprietor from dealing with land. A member of the public has no right to lodge a caveat to prevent the registration of land which is a public road.⁸

§ 118. Effect of Caveat or Caution. Each act must be consulted in order to determine the effect of the entry of a caveat, caution or notice of adverse interest. Where a contract of sale had been made by a registered owner, it was held that the subsequent lodging of a caveat against the registration of any transfer only put a cloud on the registered title and did not amount to such evidence of absolute want of title as to induce the court to refuse to decree to the purchaser specific performance of the contract.⁹ The lodging of a caveat is not notice to the public, and does not affect dealings with the property outside of the office of the registrar. The lodging of a caveat is merely to give to any person subsequently about to deal with the land notice of the claim of the caveator. If any other effect is to be given to a caveat, notice of the claim of the caveator must be given to the person to be affected. Where there has been no notice, it is unnecessary for a registered mortgagee, who is paying out the money to the mortgagor from time to time in installments, to search the register for caveats before paying over an installment.¹⁰ A caveat will suspend the entry of an instrument presented for registration, but it will not affect priority of registration, as against another instrument subsequently presented.¹¹ The filing of a caveat will not revive rights which have been lost through laches.¹² While a caveat remains in force, no change in ownership or dealing with the land is to be registered, unless the registration is made expressly subject to the claim of the caveator. In the foreign acts provision is made for the filing of a caveat against the bringing of land under the act, and appropriate proceedings are set forth for the determination of the questions involved. Such a caveat is one against an application for registration; other caveats

⁸ In *re Innes*, 12 N. S. W. L. R. (L.) 108; 7 W. N. 115 (1891). *Tierney v. Loxton*, 12 N. S. W. L. R. (L.) 308; 8 W. N. 79 (1891).

⁹ *Taylor v. Bank of Victoria*, 12 V. L. R. 748; 8 A. L. T. 39 (1886).

¹⁰ *Queensland Trustees v. Registrar*, 5 Q. L. J. 46 (1893).

¹¹ *Kissling v. Mitchelson*, N. Z. L. R. 3 C. A. 261.

¹² *Butler v. Company*, N. Z. L. R. 2 S. C. 296.

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are against dealings with the land. In Australia there are official and non-official caveats. An official caveat is lodged by a registry officer to protect some interest, usually a trust in the land, and a non-official caveat is lodged by some other person. Either may be lodged by an order of court. A registered proprietor may enter a caveat to give notice of outstanding interests in others and to restrict his own power of disposition. The entry of a caveat is not equivalent to registering an interest, but is in the nature of an injunction to prevent the legal owner from dealing with the land in derogation of equitable rights.¹³ Since equitable interests may not be registered, caveats are provided for in order that such interests may be protected, but the interest must be in existence at the time of the filing of the caveat, and the caveat becomes of no effect when the interest ceases. It must set forth explicitly the interest claimed.

§ 119. Caveats or Notices of Adverse Claims. Under the recording system, at least in most states, a person claiming an interest in land may prepare an affidavit, describing the land, and setting forth his interest by attaching certain papers, or otherwise, and file it for record as a notice of his claim against the land. When he has done this, no further duty is imposed on him, and if the owner of the paramount title desires to get rid of the cloud on the title, he must take the proper steps to have it removed by proceeding in court. But under the foreign registration acts a caveat is deemed to have lapsed after a certain number of days, unless the caveator within that time institutes a suit in court to establish his claim, title or interest.¹⁴ In most of the acts the time within which a caveator must proceed to establish his claim in court is fixed at thirty or sixty days from the entry of it on the register, but under some acts the time within which he must proceed is fixed by the registrar in a notice served on the caveator. As

¹³ Hogg, Australian Torrens System, pg. 802.

¹⁴ § 54 English act, 1875, see rule 190. § 76 Ontario act, see rule 22. § 49 British Columbia act. § 131 Manitoba act. § 94 Alberta act. § 141 Saskatchewan act. § 34 Vic-

torian act. §§ 25, 39 Queensland act. § 26 New South Wales act. § 145 New Zealand act. § 191 South Australia act. § 83 Tasmania act. § 32 Western Australia act.

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a matter of practice the filing of a caveat is a notice that a suit is about to be brought to enforce a claim, and the caveat suspends any further registration until the suit can be prepared and instituted. It is lodged as auxiliary to the proceeding about to be begun in court. By an order of court for good cause shown a caveat may be extended for a longer period than that provided for in the statute.¹⁵ A distinction is made between ordinary caveats to prevent dealings with land and caveats entered for the protection of interests arising under trusts. Ordinary caveats will lapse in a given time, and may be removed from the register, but a caveat to protect a trust does not lapse and is not subject to removal so long as the interest exists.¹⁶

§ 120. Caveats in This Country. In the foreign acts there are many sections devoted to provisions concerning caveats,—who may enter one, the effect of one, priority of rights protected by one, the entry and alteration of one, when required, effect of omission to enter one, form and contents of one, what dealings are affected by one, notice under and procedure on one, lapse of and withdrawal of one, compensation for improper lodgment of one, etc., etc. But in this country the provisions concerning caveats, cautions and notice of adverse interests are quite meager, and unsatisfactory. In New York a person claiming an interest in land may file a caution requiring written notice to be given to him of any application to register the land, and a like cautionary notice may be required by the owner of any land, as to the registration of the title of any or all of the land abutting upon his land.¹⁷ But in that act there is no provision for cautions against registered dealings with registered lands. In California nothing is said about caveats, cautions or notices of adverse claims. In some states any person claiming an interest in registered land, adverse to the registered owner, arising subsequent to the original registration, may file a sworn statement in writing, fully setting forth his claim, its derivation and character, describing the land and the certificate of title, and giving his address,

¹⁵ *In re Christie*, 23 N. Z. L. R. 558 (1903). *In re caveat of Harmon Lewis*, 23 N. Z. L. R. 581 (1903).

¹⁶ Hogg, *Australian Torrens System*, p. 974.

¹⁷ § 15 New York act.

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and this statement shall be registered as an adverse claim.¹⁸ In all of these states, except in Illinois and Oregon, it is further provided that, upon the petition of any party in interest, the court shall grant a speedy hearing upon the question of the validity of such adverse claim, and shall enter such decree thereon as justice and equity may require. If the claim is adjudged to be invalid, the registration shall be cancelled, and the court may award such costs and damages as it may deem just in the premises, including reasonable attorney's fees.¹⁹ If the court finds that the claim is frivolous and vexatious, it may tax the adverse claimant with double costs,²⁰ or with double or treble costs in its discretion.²¹ A caveator "without just cause" is liable for compensation for damages.²² Under acts containing such a provision it would seem that the compensation must be recovered by some proceeding or action. This is clearly so where the caveat is withdrawn, and no trial is had on the merits of it. If the caveat is tried, compensation may be fixed by the judge in Manitoba.²³ In some jurisdictions compensation may be fixed by a judge on a summons in chambers.²⁴

§ 121. Registration of Title, Adverse Occupation. The statute of limitations does not run, in favor of a decree of initial registration, against a person in adverse occupation of the land, not served with summons.²⁵ The general theory of the Torrens system in foreign countries is that, unless it is otherwise provided in the act, the issue of a certificate of title extinguishes all right, title and interest of any person in the land in favor of the registered owner. In New South Wales and Queensland

18 § 68 Minnesota act. § 82 Colorado act. § 81 Washington act. § 92 Illinois act. 90 Oregon act. § 105 Massachusetts act. § 110 Philippine act. § 106 Hawaiian act.

19 § 68 Minnesota act. § 82 Colorado act. § 81 Washington act.

20 § 105 Massachusetts act. § 106 Hawaiian act.

21 § 110 Philippine act.

22 § 94 Alberta act. § 141 Saskatchewan act. § 89 Ontario act. § 135 Manitoba act. § 56 English act, 1875. § 147 Victorian act. § 85 Tasmania act. § 103 Queensland

act. § 191 South Australian act. § 98 New South Wales act. § 147 New Zealand act. § 140 Western Australia act.

23 § 135 Manitoba act.

24 § 85 Tasmania act. § 47 Victorian act. § 140 Western Australia act.

25 State v. Westfall, 85 Minn. 437; 89 N. W. Rep. 175; 54 Cent. L. J. 282 (1902). People v. Simon, 176 Ill. 165; 52 N. E. Rep. 910; 68 Am. St. Rep. 175; 44 L. R. A. 801 (1898).

any adverse occupant of the land loses his rights when a certificate of title is issued, but in the other jurisdictions his rights are not prejudiced by the bringing of the land under the act. Some acts provide that a registration of a title shall be subject to any rights subsisting under any adverse possession of such land,²⁶ and others state that any certificate of title issued upon the first bringing of land under the provisions of the act, and any successive certificate, shall be void as against the title of any person adversely in actual occupation of and rightfully entitled to such land at the time of the issue of such certificate.²⁷ The meaning of these sections is practically the same.²⁸ A title may be acquired under such sections by prescription either before or after the land is registered under them.²⁹ If a person is in adverse occupation of the land at the time of the original registration, and suit is brought against him in ejectment, he may show that the registration was obtained by fraud, and the certificate will be set aside if the fraud is proved.³⁰ Acts providing for the registration of titles are not intended to turn out, by a secret proceeding, persons who have held possession of land for a number of years.³¹ In some acts there is a provision that nothing contained therein shall affect any act done or any right of action existing, accruing or accrued, and that rights, estates and interests, existing in any person by virtue of any former law in force relating to titles to real estate, shall be and are preserved, so far as they are consistent with the acts.³²

§ 122 Prescription, Adverse Possession. In some acts it is provided that no title to registered land, in derogation of that of the registered owner, may be acquired by prescription or adverse possession.³³ In the acts of England, Ontario, Nova

²⁶ § 74 Victorian act. § 68 Western Australia act.

²⁷ § 67 New Zealand act. § 69 South Australian act. § 135 Tasmania act. See *Harvey v. Williams*, 18 S. A. L. R. 8 (1883). *Franklin v. Ind*, 17 S. A. L. R. 133 (1883). See also § 81 British Columbia act. § 74 Manitoba act.

²⁸ Hogg, Australian Torrens System, p. 806.

²⁹ *In re Allen*, 22 V. L. R. 24

(1896). See § 222 Western Australia act.

³⁰ *Wadham v. Buttle*, 13 S. A. L. R. 1 (1879). *Saunton v. Brown*, 1 V. L. R. (L.) 150 (1875). *Ex parte Rigby* 9 V. L. R. (L.) 417 (1883).

³¹ *Harvey v. Williams*, 18 S. A. L. R. 8 (1884). *Sheridan v. Gilles*, 21 S. A. L. R. 7 (1887).

³² § 203 Saskatchewan act. § 154 Alberta act.

³³ § 33 New York act. § 41 Illin-

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Scotia and Hawaii it is expressly stipulated that this provision of the law shall not prejudice any adverse claim, as against any person registered as first owner of the land with a possessory title only, in respect of length of possession of any other person who was in possession of the land at the time when the registration of such first owner took place.³⁴ This proviso is necessary because a person may be registered with a possessory title only, on production of his deed and without strict proof of ownership or possession of the land.³⁵ It will be noticed that the adverse claim is not to be prejudiced as against the first registered owner, and the inference seems to be that if the first registered owner transfers the title to an innocent purchaser for value who relies on the register, the claim of the adverse occupant will be destroyed. Under the Washington act, registered land and ownership therein is in all respects subject to the same burdens and incidents as unregistered land, and there is no provision that title may not be acquired by adverse possession.³⁶ Where the general laws provide that twenty years of open, notorious and adverse possession will give a good title to the land as against the record title, and the land registration act does not provide that no adverse title in derogation of the registered title may be acquired by prescription, a person may take possession of registered land, occupy it for twenty years, comply with all the requirements of the general limitation law, and thereby obtain a good and valid title as against the registered owner.³⁷ Where the statute provides that no title in derogation of that of the registered owner may be acquired by prescription, no title to an easement may be acquired by user for twenty years.³⁸

§ 123. Occupation of One Registered under Invalid Title, Right to Value of Improvements. In any case other than the

ois act. § 40 Oregon act. § 34 Colorado act. § 2 Minnesota act. § 35 California act. § 45 Massachusetts act. § 46 Philippine act. § 81 British Columbia act. § 75 Manitoba act. § 251 South Australia act. § 45 New South Wales act. § 57 New Zealand act. § 52 Act for Ireland, 1891.

³⁴ § 12 English act, 1897 which repealed § 21 of act of 1875. § 32

Ontario act. § 42 Nova Scotia act. § 46 Hawaiian act.

³⁵ Ante, § 13.

³⁶ § 53 Washington act.

³⁷ *Belize Estate v. Quilter*, L. R. A. C. 367 (1897). House of Lords and Privy Council; Appeal from Supreme Court of British Honduras.

³⁸ *Bannister v. Chiene*, 22 N. Z. L. R. 628 (1902). *Clark v. Hopkins*, 17 N. Z. L. R. 201 (1898).

case of a person registered through fraud, whenever an action of ejectment is brought against a person holding a certificate of title to certain land, if the defendant or any person through whom he claims shall have made improvements on the land, since he obtained the certificate thereto, whether he admit or deny the plaintiff's title, he may give notice to the plaintiff of the fact of such improvements, and may set a value thereon. If a verdict be found for the plaintiff, the jury must assess the value of such improvements, and the amount of their value will be a lien on the land.³⁹ It seems that in the absence of some such statutory provision, the defendant will lose the value of such improvements.⁴⁰

§ 124. Possession of Tenant. The rights of a tenant in possession of land under an unregistered lease differ under the several acts. In New South Wales no provision is made for a tenancy under an unregistered instrument. In the other states in Australia short leases of some kind are valid without registration. When such a lease is valid, and the tenant is in possession under it, a purchaser of the land must take notice of the rights of the tenant. In some acts it is provided that any certificate of title issued on the first bringing of land under the act, and every certificate of title issued in respect of the same land, or any part thereof, to any person claiming or deriving title through the applicant proprietor, shall be void as against the title of any person adversely in actual occupation of and rightfully entitled to such land at the time when it was so brought under the act, and continuing in such occupation at the time of the issue of any subsequent certificate; but every such certificate is binding and effectual against the title of any other person, as if such adverse possession did not exist.⁴¹ The statutes of Victoria and Western Australia provide that every certificate shall be subject "to any rights subsisting under any adverse possession of such land".⁴² A former Vic-

³⁹ § 47 Queensland act, 1877. § 125 New South Wales act.

⁴⁰ *Oelkers v. Merry*, 2 Q. S. C. R. 193 (1872). *Merry v. Society*, 3 Q. S. C. R. 40 (1872). These actions were brought before the passage of the act of 1877, which contains the

above § 47. Hogg, *Australian Torrens System* p. 860.

⁴¹ § 67 New Zealand act. § 69 South Australia act. § 135 Tasmania act. § 81 British Columbia act.

⁴² § 74 Victorian act. § 68 Western Australia act.

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torian act provided and the present Tasmanian act provides that every certificate shall be subject to "the interest of any tenant" in the land.⁴³ This means that a purchaser of the land must take notice of every possible right, even to the possible acquirement of an absolute ownership, which the person, in actual occupation, holding under some landlord, may have in the land, and that every interest of such tenant in the land, growing out of and not disseverable from his right to continue in occupation as such tenant, is protected by the terms of the statute against the claim of a proprietor under a certificate of title. Where under such a statute a tenant in possession had a contract to purchase the land, and the proprietor, who had contracted to sell, transferred the land to a new proprietor who brought suit to oust the tenant, it was held that he could not recover the land from the tenant. The court said: "It is impossible in such a case to dissever the tenancy and the contract from one another. They together constitute * * * an interest to which the land was subject, and which is entitled to prevail against the claims of the new proprietor under his certificate."⁴⁴ A right of purchase acquired under a lease is as much protected by registration as the term granted by the lease. An option to purchase the land, contained in a lease, is an integral part of the lease itself, and registration of the lease is registration of every right given under it.⁴⁵ Under one act all registered land is subject to tenancies created for any term not exceeding thirty one years, or for any less estate, in cases where there is an occupation under such tenancies.⁴⁶ It is evident that in some foreign states an intending purchaser must examine into the rights and claims of persons in possession, just as he must do in this country under the general laws. Where a tenant occupies land under a lease which by the act is required to be registered, but is not registered, and the land is sold to a new proprietor, the tenant holds at will only, as against the new proprietor.⁴⁷ A tenant whose lease is not reg-

⁴³ § 40 Tasmania act.

⁴⁴ Sandhurst Bldg. Society v. Gissing, 15 V. L. R. 329 (1889). See Robertson v. Keith, 1 V. L. R. Eq. 11; Colonial Bank v. Rabbage, 5 V. L. R. L. 462.

⁴⁵ Rutu Peehi v. Davy, 9 N. Z.

L. R. 134 (1890). Fels v. Knowles, 26 N. Z. L. R. 604 (1906).

⁴⁶ § 47 Act for Ireland, 1891. In England the period is 21 years. § 18 English act, 1875.

⁴⁷ Edwards v. Wallace, N. Z. L. R. 1 S. C. 134.

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istered, who knows that the land is about to be sold and transferred, must file a caveat in order to protect his rights. A mere notification to the intending purchaser that he holds a lease is not sufficient to establish the rights of the tenant under it.⁴⁸

§ 125. Transmission of Land in this Country. Under methods of jurisprudence which follow the Code Napoleon lands of a deceased ancestor are said to go to his heirs "by succession"; under jurisprudence founded on the English common law such lands are said to pass "by descent"; and under the Torrens system the registered lands of a deceased owner are said to pass "by transmission". Under this system the word "transmission" has a broad meaning, for it includes the acquirement or passing of title to registered land in any manner other than by transfer,—e. g.—by descent, will, bankruptcy, insolvency, or by virtue of appointment or succession to any office.⁴⁹ By the terms of the Oregon act, registered land, on the death of the owner, goes to the personal representative as personalty, except that the rule of division is the same as in the descent of real property, or as may be provided by will.⁵⁰ The original act of Illinois, 1897, contained the same provision, but by amendment it is now provided that registered land shall descend to heirs and devisees according to the statutes of descent and of wills in force at the time of the death of the owner, but no transfer to such heirs or devisees may be made until an application for such transfer is filed in the circuit court by some interested person, setting forth all facts as to the interests and interested persons, as in an original application.⁵¹ In all the other states registered land goes to the heirs of a deceased owner, according to the general laws of descent, or to the devisees under his will, to be transferred to them on the register in due course on the order of the proper court, entered on the application of an interested person.⁵² In New

⁴⁸ Oertel v. Hordern, 2 St. Rep. (N. S. W.) Eq. 37 (1902). Lake v. Jones, 15 V. L. R. 728 (1889).

⁴⁹ § 3 South Australia act. § 3 New South Wales act. § 3 Queensland act. § 2 New Zealand act. § 3 Tasmania act. § 4 Victoria act. § 4 Western Australia act. § 2 Sas-

katchewan act. § 2 Manitoba act. § 5 Alberta act respecting transfer and descent of land, 1906.

⁵⁰ § 69 Oregon act.

⁵¹ §§ 70, 71, 72 Illinois amending act, 1907.

⁵² § 66 Minnesota act. §§ 71, 72 California act. § 74 Colorado act.

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York and in Illinois the proceedings and action on such application are the same as in case of original registration of a title, except that the certificate of title of the deceased owner is conclusive evidence of his title at the time of his death.⁵³ A certificate issued to heirs or devisees before the final settlement of the estate of the deceased owner should state expressly that it is subject to the probate and final settlement of his estate, and after final settlement thereof such memorial may be removed by order of court on a proper petition and showing. From the language of the sections which have just been cited, it is evident that in some states the court having jurisdiction to administer the estates of deceased persons has jurisdiction also to determine heirship and order the issue of a new certificate to heirs or devisees entitled to it; it is also evident that in some states the probate court has no jurisdiction to entertain an application for an order for the issue of a new certificate of title to heirs or devisees. Where the application for such a certificate must be made to a court of general jurisdiction, as an independent proceeding, costs and expenses must be borne, which may seem heavy and unfortunate in cases of small holdings. It seems incongruous that an act should provide that, on a successive registration on a transfer of registered land, the registrar shall pass on all the necessary questions in order to determine whether an entry shall be made and what it shall contain, and that at the same time it should provide for a new application to the court for registration of a title on the death of the registered owner. If the registrar may determine all necessary questions of law and fact on a registration of a transfer, it would seem competent for him to determine all questions of heirship on a registration on transmission of registered land.

§ 126. Transmission in Foreign Countries. In England registered land on the death of the owner, notwithstanding any testamentary disposition, devolves to and becomes vested in his personal representative, or any successive personal representative, as if it were a chattel real vesting in him.⁵⁴ In

§ 73 Washington act. § 55 New act.

York act. § 91 Massachusetts act. 53 § 55 New York act.

§ 92 Hawaiian act. § 89 Philippine 54 §§ 1, 2 English act, 1897.

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discussing this feature of the English law, it is often said that it establishes a real representative. The sub-title is "Establishment of a Real Representative" and concerning this it has been said: "This is a misleading title, as the object of this part of the act is to abolish the real representative as distinguished from the personal representative, and to endow the latter with the functions formerly exercised by the real representative."⁵⁵ In many jurisdictions, on the death of a registered owner, the executor or administrator of his estate is entitled to be registered as owner in his place. The new registration must describe him as executor or administrator of the estate. If, after the administration of the assets of the estate, with due regard to the laws concerning the application of personal and real property to the payment of debts, the land remains for those who are entitled to it as heirs or devisees, it is transferred to them by the personal representative, and they are registered as the new owners. An executor or administrator registered as owner of land by transmission takes and holds it with the same title and subject to the same equities and obligations as the decedent held it, but for the purpose of any dealing with it he is deemed to be the absolute owner thereof.⁵⁶ As the absolute owner for the purpose of dealing with the land, he has the same power to dispose of it and the same duty to apply the proceeds to the payment of debts of the estate as an executor has, who is given by will the power to sell land to pay debts, and a purchaser from an executor or administrator registered as owner need not inquire into the existence of debts of the estate or see to the application of the proceeds of the sale to the payment of them. In Queensland and Tasmania registered land passes to the administrator as personalty, and rights of courtesy and dower are abolished. The administrator may be registered as proprietor, and for the purpose of dealing with the land is deemed to be the absolute owner.⁵⁷ In some of

⁵⁵ Brickdale and Sheldon, *Land Transfer acts*, p. 234.

⁵⁶ § 42 English act, 1875. Rule 128 English rules, 1898. § 60 Ontario act. § 96 New South Wales act. §§ 176-180 South Australia act. § 193 Victorian act. § 187 Western Australia act. § 16 New Zealand

administration act., 1879, §§ 5, 118, 125 Saskatchewan act. § 2 Alberta act respecting transfer and descent of land. § 21 Manitoba devolution of estates act. §§ 74, 76 Alberta act.

⁵⁷ §§ 11-14, 25, 27, 28 Queensland intestacy act, 1877. §§ 4, 5 Tasma-

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the provinces of Canada, land not only descends to the personal representative of the decedent in the same manner as a personal estate, but, in the absence of a will, it is distributed as such. No devise of land is valid or effectual as against the personal representative of a testator until the land is transferred to the devisee by the personal representative. Such representative must take out a new certificate, and he is then deemed to be the owner of the land from the date of the death of the deceased owner.⁵⁸ In British Columbia land seems to go directly to heirs and devisees.⁵⁹

nia deceased persons' estates act, 1885.

⁵⁸ §§ 5, 6, 118-120 Saskatchewan act. § 119 Manitoba act. § 21 Manitoba devolution of estates act. § 2 Alberta act respecting transfer and

descent of land. §§ 74, 76 Alberta act. Courtesy and dower are abolished.

⁵⁹ §§ 45, 47 British Columbia act. See also § 73 Nova Scotia act.

CHAPTER XI.

Forgery.

§ 127. **Forgery.** In the report of Mr. C. F. Brickdale on the systems of registration of title in operation in Germany and Austria-Hungary, presented to the Parliament of England in 1896, it is said: "With regard to the exact effect of a forgery in case the registrar and the state both escape liability for neglect, there are two principal classes of cases to be considered, first, where the present registered owner, ignorant of the fraud, derives his title direct from the forger, and, second, where the forgery has taken place some way back, and the present owner is a transferee from one who was actually on the register at the time of making the conveyance. No instance of any of these cases having yet occurred in practice, my informants were only able to give general replies to those questions, but it seems to be considered clear that in the latter case the present registered owner, holding for value and in good faith, would be supported, while in the former case he would not. The injured party in each case would have only his personal action against the wrong-doer."¹ In most of the Torrens acts no reference is made to a forged instrument or to the effect which is to be given to it under any circumstances or conditions. In South Australia, by the act of 1886, under which operations are now conducted, it is declared that in case a certificate or other instrument of title is obtained by forgery, it shall be void; provided, that the title of a registered proprietor who has taken bona fide for a valuable consideration shall not be affected by reason that a prior certificate was

¹ Observations, 67 and 68, page 17.

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obtained by forgery.² The California act contains a similar provision: "If a deed or other instrument is registered, which is forged * * * such registration shall be void; provided, that the title of a registered owner, who has taken bona fide for a valuable consideration, shall not be affected by reason of his claiming title through someone, the registration of whose right or interest was void as provided in this section."³ In Ontario it is provided that "subject to the provisions in this act contained with respect to registered dispositions for valuable consideration, any disposition of land or of a charge on land, which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner."⁴ This is by no means clear and explicit as to the effect of forgery under the act, but it seems to mean that the registration of a forged instrument is void, but that the registration of a person, who takes bona fide for value from the person registered through forgery, is valid and confers upon him the estate with which he is registered. The clause "subject to the provisions in this act contained," etc., seem to refer to a provision which is contained in all Torrens acts, and which will be referred to in the next section.

§ 128. Effect of forgery where the statute is silent on the subject. In Australasia there is a line of cases founded on the principle that a certificate of title obtained on the faith of an invalid instrument is not conclusive, and may be set aside, except as against the intervening rights of a new registered owner in good faith and for a valuable consideration; but that such new registered owner, taking from a person whose registration is invalid, obtains the estate and title with which he is registered.⁵ Some of these cases relate to forged instruments and some relate to instruments invalid for reasons other than forgery. We should expect to find this doctrine laid

² § 69 par. 2 South Australia act.
³ § 38 California act. § 75 Ohio act was identical with this.

⁴ § 124 Ontario act.

⁵ Hall v. Loder, 7 N. S. W. L. R. Eq. 44 (1885). Ex parte Davey, Registrar, 6 N. Z. L. R. 760 (1888). Bailey v. Cribb, 2 Q. L. J. R. 42

(1884). O'Connor v. O'Connor, 9 A. L. T. 117 (1887). Coleman v. Riria Puwhanga, N. Z. L. R. 4 S. C. 230 (1886). Magor v. Donald, 13 V. L. R. 255; 8 A. L. T. 150 (1887). Messer v. Gibbs, 13 V. L. R. 854 (1887). Cox v. Bourne, 8 Q. L. J. 66 (1897).

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down in any system of title registration. All Torrens acts provide in substance that the registered owner of any estate or interest in land, except in case of fraud to which he is a party, and except in case of the fraud of the person through whom he claims without valuable consideration paid in good faith, shall hold the same subject only to such interests as may be noted in his certificate and free from all others except the statutory rights and incumbrances. When there is no express provision in an act, regulating the subject of forgery, the above provision is the one which defines the rights of persons registered as owners in case of a forgery. The declarations of this provision are in harmony with the line of Australian cases referred to, and, when applied to a case of forgery, are in effect the same as the sections of the South Australia, California and Ontario acts just cited. Forgery is fraud, and, this being admitted, the implied declaration of the provision is that the registration of a forger, or of a person registered under him without valuable consideration paid in good faith, may be set aside; but a new registered owner for value in good faith registered under either of these, will hold the title as against the victim of the forgery or those claiming under him. While forgery is fraud and is generally governed by the same rules as fraud, there is one situation in title registration where the result of forgery differs from the result of fraud. Where a person in good faith and for value is registered as owner of an estate or interest in land, as the result of fraud in which he did not participate in any way, he keeps the estate or interest with which he is registered, as against the prior registered owner; but where such a person is registered as the result of a forgery about which he knew nothing, his registration is null and void, as against the prior registered owner. We are now considering Torrens acts which do not specifically mention the subject of forgery, and this difference in the results of registration through fraud and through forgery arises from a technical principle of title registration, and not from the general law under which all claim of title based on a forgery is void. This principle, which will be treated at length in the next section, is that a person at his peril must see that he gets

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his registration from the prior registered owner. The register is a list of registered owners of estates and interests in land, and it protects those only who take under registered owners.

Unless otherwise provided in a Torrens act, the rule in case of forgery may be stated as follows: The registration of a forger, or of a person in good faith and for value as the result of a forgery, or of a person claiming under either of them without a valuable consideration paid in good faith, may be set aside, but the registration of a person for value and in good faith, claiming under any one of these, will hold the title as against the former registered owner who is the victim of the forgery, and all claiming under him. A forged transfer or mortgage will become the root of a valid title. While it is plain that a bona fide purchaser for value from an owner registered under a forged instrument does himself take under a null deed, that his vendor has nothing to transfer, and that until the transfer has been duly registered the instrument of transfer necessarily is null, yet when it is registered it takes effect by virtue of the statutory declaration of the conclusiveness of a certificate and the indefeasibility of a registered title, because the transferee has dealt with a registered owner.

§ 129. Forgery, Duty of a New Registered Owner or Mortgagee. A person about to deal with a registered title, and about to be registered as a new owner of an estate or interest in land, must ascertain at his own peril the existence and identity of the registered owner under whom he is to be registered, the authority of any person to act for him, and the validity of the transfer under which he is to claim.⁶ It follows that a person must show that he is registered under the last real registered owner, or he will not be protected by the register. The underlying principle is that, by the registration of a person as the owner of a certain estate or interest in land, the records of a public office are made to certify that such person has the title as registered, and, as against a regis-

⁶ *Gibbs v. Messer*, 1891 A. C. 248, House of Lords and Privy Council, on appeal from the supreme court of Victoria. See also *Ex parte Davey*, Registrar, 6 N. Z.

L. R. 760 (1888). *Ex parte Batham*, 6 N. Z. L. R. 342 (1888). *Attorney General v. Odell*, L. R. 2 Chan. Div. 47 (1905). This is what he must do in case of unregistered land.

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tered purchaser in good faith for value from such person, there should be an estoppel to deny that fact. But the instrument purporting to deal with the land is primarily accepted by the purchaser or mortgagee, and not by the registrar, the public officer, and there is no reason why he should not have the burden of ascertaining the existence and identity of the registered owner under whom he is to be registered, and the validity of the transfer to him. It is plainly his duty to see that he is taking from one who is on the list of registered owners, and, before he tenders the instrument of transfer to the officer for registration, he must know that it is valid in all respects. The case of *Gibbs v. Messer*, *supra*, is the leading case on this subject, and, while the opinion is long, it may be quoted with profit. It is as follows: " This appeal depends upon the construction of the Transfer of Land Statute, No. 301 of 1866, which established a register of titles and incumbrances for the colony of Victoria, in order 'to give certainty to the title to estates in land, and to facilitate the proof thereof, and also to render dealings with land more simple and less expensive.' The facts of the case, so far as they bear upon the question which we have to decide, may be shortly stated. The plaintiff, Mrs. Messer, who resides in Scotland, was entered in the register as proprietor in fee simple, free from incumbrances, of certain parcels of land in the district of Hamilton. In the year 1884, she was joined by her husband, who left behind him in the colony, in the custody of Charles James Cresswell, a solicitor at Hamilton, her duplicate certificates of title, and also a power of attorney, by which she had authorized her husband to sell, mortgage or otherwise dispose of the lands. During their absence from the colony, Cresswell forged a transfer of the lands by Mr. Messer, as his wife's attorney, to 'Hugh Cameron, of North Hamilton, county of Dundas, grazier.' It is admitted that there was no such person as the transferee in existence. Cresswell then, representing himself to be agent for Hugh Cameron, produced the transfer, dated the 11th of August, 1885, along with Mrs. Messer's certificates of title, to the registrar, who cancelled each folio in which her name was entered, registered Hugh Cameron as proprietor upon a new folio, and issued the usual duplicate certificate in his name. Still professing to act as agent for Hugh Cameron, Cresswell next arranged with the defendants, the McIntyres, for a loan of £3000, to be secured by mortgage. He wrote, with his own hand, a deed of mortgage, bearing date the 10th of October, 1885, purporting to be executed by Cameron, he himself being

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the subscribing witness, whose attestation is required by the statute. Upon the faith of that document the McIntyres paid the money to Cresswell, who forthwith appropriated it to his own purposes. When they presented their mortgage for registration, the registrar declined to enter it until he was satisfied that the Hugh Cameron registered as proprietor was not identical with a person of the same name who had recently been made bankrupt. They accordingly obtained from Cresswell a statutory declaration, purporting to be sworn by his client Hugh Cameron before himself, as a Commissioner of the supreme court of the colony for taking affidavits, to the effect that the declarant had never been made insolvent, or taken the benefit of any Act relating to bankruptcy or insolvency. Upon production of that evidence the registrar duly entered a memorial of the mortgage in the folio containing Hugh Cameron's certificate of title. Mr. Messer returned to the colony in July, 1886, when these frauds were discovered, and Cresswell absconded, leaving no assets. The present suit was then brought by Mrs. Messer against (1) the registrar, (2) the McIntyres, as mortgagees of Hugh Cameron, and (3) Cresswell. It prays for an order for the calling in and cancellation of the certificates in name of Hugh Cameron, and also for the issue to the plaintiff of new certificates of title, free from the incumbrance of the McIntyres' mortgage; and alternately, in the event of the mortgage being held to constitute a valid incumbrance upon her title, for a declaration that the plaintiff shall be at liberty to redeem, and that the moneys necessary therefor be paid by the registrar out of the assurance fund created by the act.

It is clear that the registration of the name of Hugh Cameron, a fictitious and non-existing transferee, cannot impede the right of the true owner, Mrs. Messer, who has been thereby defrauded, to have her name restored to the registrar. Accordingly, in the absence of Cresswell, who has not appeared to defend, the controversy between the litigant parties has been mainly, if not wholly, confined to the question whether the mortgage is or is not an incumbrance affecting Mrs. Messer's title. If the mortgage is valid, their Lordships see no reason to doubt that Mrs. Messer has been deprived of an interest in her land, in consequence of fraud, within the meaning of sect. 144, and that, failing recovery from Cresswell (against whom she has taken all the proceedings which the clause requires), she is entitled to receive the amount payable for its redemption out of the assurance fund. On the other hand, if the mortgage does not constitute an incumbrance upon her title, Mrs. Messer will obtain a full measure of relief, and can have no claim against the fund. Webb, J., the judge

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of the first instance, sustained the validity of the mortgage, but ordered that the plaintiff should be at liberty to redeem, and that the defendant, the registrar, should pay to her, out of the assurance fund, her costs of the action, all moneys from time to time paid by her for interest in respect of the mortgage, and also all moneys necessarily paid by her for principal, interest, and costs in order to its redemption. His decision was affirmed on appeal by the Full Court, with the variation that the plaintiff was found liable in costs to the mortgagees, to be added to her own costs of suit, and repaid to her by the registrar out of the assurance fund. The registrar has appealed to this Board from the judgment of the Full Court. In the course of the argument it was maintained, on his behalf, that the protection given by the statute to proprietors of a mere interest in land, such as is created by a statutory mortgage, which does not operate as a transfer of the legal estate, is less extensive than the protection afforded to proprietors of the land itself. Their Lordships do not find it necessary to determine that point, although, *prima facie*, it does appear to have been the intention of the act to confer the same kind and degree of security upon all persons who, transacting in reliance on the registrar, acquire either proprietary rights or mere interests in land, in good faith and for valuable consideration. They assume, for the purposes of this case, that the statute, in that respect, makes no distinction between these two classes of proprietors; and that the McIntyres' mortgage is not liable to impeachment upon grounds which would have been unavailing against a transfer of the land obtained by them, in similar circumstances, from the same author. Their Lordships do not propose to criticise in detail the various enactments of the statute relating to the validity of registered rights. The main object of the act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases, in *bona fide* and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title. In the present case, if Hugh Cameron had been a real person whose name was fraudulently registered by Cresswell, his certificates of title, so long as he remained undivested by the issue of new certificates to a *bona fide* transferee, would have been liable to cancellation at the instance of Mrs. Messer; but a mortgage executed by Cam-

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eron himself, in the knowledge of Cresswell's fraud, would have constituted a valid incumbrance in favour of a bona fide mortgagee. The protection which the statute gives to persons transacting on the faith of the register is, by its terms, limited to those who actually deal with and derive right from a proprietor whose name is upon the register. Those who deal, not with the registered proprietor, but with a forger who uses his name, do not transact on the faith of the register; and they cannot by registration of a forged deed acquire a valid title in their own person, although the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith and for onerous consideration. The difficulty which the mortgagees in this case have to encounter arises from the circumstance that Hugh Cameron was, as Mr. Justice Webb aptly described him, a 'myth'. His was the only name on the register, and, having no existence, he could neither execute a transfer nor a mortgage. The mortgagees have endeavored to surmount that difficulty by arguing that, in the circumstances of the case, Cresswell must be held to have been *de jure*, if not *de facto*, the proprietor whose name was on the register, and that their mortgage, executed by him in the name of Hugh Cameron, is, therefore, as valid as if Cresswell's own name had been on the register, and he, and not Cameron, had been the apparent mortgagor. That argument found favour with both courts below. The views entertained by the learned judges have been very clearly explained by Mr. Justice A. Beckett, who, in delivering the judgment of the full bench, said: 'We, therefore, feel no doubt that the certificate of title on which the mortgagees advanced their money, though brought into existence by the forgery of the defendant Cresswell, was as efficacious in their favour as if it had issued upon an honest and regular transaction. That certificate described Hugh Cameron as the proprietor, and the mortgagees had the right to rely upon the certificate as evidence of his title to an indefeasible estate in the land mortgaged to them. It now appears that no such person as Mr. Hugh Cameron described in the certificate in fact existed; and the appellants contend that a mortgage purporting to be by this fictitious person, and affecting land alleged to be his, is a mortgage of a non-existing interest—a mere abstraction which cannot derogate from the rights of the true owner—and that the mortgage is therefore worthless. This contention appears to us to be answered by the view put forward in the statement of claim inferentially admitted by the registrar of title, and sustained by the evidence, that Charles James Cresswell had, for the purpose of dealing with this land, assumed the name of Hugh Cameron. It was

he who signed the transfer to Hugh Cameron as transferee, and who signed the mortgage to the defendants McIntyre, as mortgagor, and he produced the certificate of title of Hugh Cameron for the purpose of having the mortgage registered upon it. Upon these facts we think that, in favour of the mortgagees, he should be regarded as the proprietor of the land with whom they dealt, on the faith of the certificate evidencing his title.' The opinion thus expressed appears to recognize the principle that a mortgagee, advancing his money on the faith of the register, cannot get a good security for himself except by transacting with the person who, according to the register, is the proprietor having title to create the incumbrance. So far their Lordships agree; but they do not concur in the inferences which the learned judges have drawn from the facts in evidence, with respect to the position of Cresswell throughout these transactions, and his true relation to the name entered on the register as that of the proprietor. They are unable, upon the facts proved, to affirm that Cresswell 'assumed' the name of Hugh Cameron for the purpose of dealing with Mrs. Messers' land. A man cannot, with any propriety, be said to assume a name, or in other words an alias, unless he acts personally under that name, or asserts it to be his own designation. Nothing could be farther from Cresswell's purpose than his assumption of the name of Hugh Cameron; on the contrary, the mainspring of his fraudulent device consisted in representing Hugh Cameron to be a real person, a grazier, who had no connection with himself beyond that of an ordinary client. In pursuance of that device he professed to transact with the McIntyres in the capacity of Cameron's law agent, he attested what purported to be Cameron's signature to their deed of mortgage, and he gave them a document, used by them in order to obtain registration of their right, which bore that Hugh Cameron had appeared personally before him, and had signed the document in his presence, after making oath to the verity of its contents. The McIntyres must, in these circumstances, have understood Cresswell and Hugh Cameron to be distinct individualities. They nowhere allege the contrary; and if they had even suspected that Hugh Cameron was only another name for Cresswell, they would not have been justified in completing the transaction without inquiry. The McIntyres cannot, therefore, as matter of fact, be held to have dealt on the faith of the certificate as evidencing the proprietary title of Cresswell. The truth is that Hugh Cameron was in no sense an alias of Cresswell's, but a fiction or puppet created by him, in order that it might appear to be an individual having a separate and independent existence. The reasoning of the learned judges fails to appreciate the difference between

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these two things. If Cresswell had, as they say he did, 'assumed' the name of Hugh Cameron, and had used it fraudulently, he would not have been a forger. His fraud, in that case, would have lain in the representation that Hugh Cameron was his own designation, and he would, no doubt, have been amenable to the criminal law, in respect of such fraud. But, in first registering a fictitious Hugh Cameron as proprietor of the land, and then executing and delivering a mortgage in the name of Hugh Cameron, Cresswell represented the mortgagor to be a person other than himself, and committed the crime of forgery. The real character of the criminal acts perpetrated by Cresswell differs in no respect from what it would have been, had Hugh Cameron been a real person, whose name was put upon the register by him, and used by him in a forged deed creating an incumbrance.

Although a forged transfer or mortgage, which is void at common law, will, when duly entered on the register, become the root of a valid title, in a bona fide purchaser by force of the statute, there is no enactment which makes indefeasible the registered right of the transferee or mortgagee under a null deed. The McIntyres cannot bring themselves within the protection of the statute, because the mortgage which they put upon the register is a nullity. The result is unfortunate, but it is due to their having dealt, not with a registered proprietor, but with an agent and forger, whose name was not on the register, in reliance upon his honesty. In the opinion of their Lordships, the duty of ascertaining the identity of the principal for whom an agent professes to act with the person who stands on the register as proprietor, and of seeing that they get a genuine deed executed by that principal, rests with the mortgagees themselves; and if they accept a forgery they must bear the consequence."⁶

The court thereupon declared the purported mortgage to be invalid and as constituting no incumbrance on the title of Mrs. Messer, and it directed the cancellation of the two certificates in the name of Hugh Cameron and the substitution therefor of certificates of title in the name of Mrs. Messer.

A person stole a certificate of title, impersonated the registered owner, forged the latter's name to a mortgage, and the mortgage was duly registered in favor of a person who advanced the money in good faith on the supposed security; it was held, that the forged memorandum of the mortgage was

⁶ Gibbs v. Messer, 1891, A. C. Council.
248, House of Lords and Privy

invalid and conferred on the mortgagee no title, estate or interest in the land.⁷

§ 130. Some Comment on Gibbs v. Messer, supra. It never has been suggested that the case of *Ex parte Davey*, supra, was inconsistent with the line of Australasian cases above referred to, which hold that the title of a registered owner who has taken bona fide for value from a person registered through forgery is valid. That case was decided on the ground that the protection of the register is given to those only, who deal with the last registered owner. *Gibbs v. Messer*, supra, was decided on the same ground,—that a mortgagee registered under a fictitious, not a real, prior registration could take nothing,—and yet it seems to be the opinion of writers on the Australian Torrens system that the latter case overrules the line of cases just mentioned.⁸ The case of *Gibbs v. Messer* clearly may be distinguished from those cases, because in them real persons registered as owners through forgery procured third persons to be registered as owners of an interest in land. It is clear that the court which rendered the decision did not regard it as overruling those cases, for some four years afterward, in another case, it said that there is nothing in *Gibbs v. Messer* which supports the view that a registered owner claiming in good faith for value under a prior registered owner does not get a good title against everyone.⁹

§ 131. Effect of Some Statutes on the Rules Just Laid Down. In some acts it is provided that the production of the owner's duplicate certificate, whenever any voluntary instrument is presented for registration, shall be conclusive authority from the registered owner to the registrar of titles to enter a new certificate or to make a memorial of registration in accordance with such instrument, and that a new certificate or memorial shall be binding upon the registered owner and upon all claiming under him, in favor of every purchaser for value and in good

⁷ *Ex parte Davey*, Registrar, 6 N. Z. L. R. 760 (1888).

⁸ See Hogg, Australian Torrens System, p. 829 et seq. Duffey and Eagleson, Transfer of Land Act, 1890 pp. 192, 225.

⁹ See *Assets Company v. Mere Roihi*, 1905, A. C. 176 on page 204.

In commenting on this case in a supplementary addendum of March 1, 1905, in the first part of the book, Hogg, Australian Torrens System, says that the decisions in *Coleman v. Riria Puwhanga* and *Magor v. Donald*, supra, must now be regarded as good law.

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faith.¹⁰ When a person is dealing with land registered under an act containing such a provision, it seems to be unnecessary for him to require any other evidence of the existence and identity of the registered owner than the production of the owner's duplicate certificate, and it seems that he may rely on the validity of a conveyance from the person producing such certificate. If this is the right construction of this declaration, it validates the title of an innocent person for value, relying on the production of the certificate, who is registered as the immediate result of a forgery committed by some third person, and, in doing so, it goes one step beyond the general Torrens system, which requires that a registration be made under the last real registered owner, in order to be valid. If the production of the last certificate of title makes the new certificate binding on the registered owner whose name has been forged, in favor of the new registered purchaser for value and in good faith, then the latter keeps the title to the land, and the former registered owner is remitted to his remedies against the person causing the loss and against the indemnity fund. In *Gibbs v. Messer*, supra, and *Ex parte Davey*, supra, the owners' duplicate certificates were produced at the time of the new registrations, and if the Victoria and New Zealand acts had declared that the production of such a certificate should make a memorial of registration binding on the last registered owner, in favor of a new registered purchaser for value in good faith, the decisions in those cases might have been entirely different. The intention of the legislature must be very clear, before a court will hold that a person registered and claiming immediately under a forged instrument will take an indefeasible title by virtue of his registration, and it may be very doubtful whether, in enacting the provisions just referred to, there was really any intent on the part of the legislature to declare that the production of the last duplicate certificate should validate a new certificate, even though it was issued as the result of a forgery. It is much more probable that the purpose of the provisions was to get away from the suggestion that the registrar was acting in a judicial capacity when he

¹⁰ § 50 Colorado act. § 49 Washington act. In § 49 Minnesota act and in § 47 Nova Scotia act the word "conclusive" is omitted.

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made a registration, and to have the validity of a transfer declared under the terms of a statute, rather than to have it inferred as a matter of law from the act and determination of the registrar. Nevertheless, the provisions seem to show a clear legislative intent, in any event and under any circumstances, even in case of forgery, to vest the title in the new registered owner, whenever the last duplicate certificate is produced at the time of registering the transfer.

While the acts of Massachusetts, Hawaii and the Philippine Islands provide that the production of the owner's duplicate certificate shall be conclusive authority to the registrar to make a new registration, and that a new certificate shall be binding in favor of every purchaser for value and in good faith, there is this qualification: "After the transcription of the decree of registration on the original application, any subsequent registration which is procured by the presentation of a forged duplicate certificate, or of a forged deed or other instrument, shall be null and void."¹¹ This qualification does not say that any title founded on a forgery shall be null and void, but it merely says that a registration procured by a forged certificate or other instrument shall be void, and we may infer that under such a statute the general rule applies, that a registration procured by forgery is void, but that such a registration may be the root of a good title, and that a person registered in good faith and for value under a prior registration procured by forgery, when the last certificate is produced, takes a valid title. Looked at from this point of view, the three acts just mentioned simply declare the general rule where the statute is silent on the subject of forgery, and are in effect the same as the South Australia, California and Ontario statutes.¹²

§ 132. Forgery Declared Void. In England, under the land transfer act of 1875, it is apprehended that a forged transfer, completed by registration and followed by a completed transfer for value in a third person, could not be rectified,¹³ but the act of 1897 provides "that where a registered disposition would if unregistered be absolutely void, * * * the register shall

¹¹ § 54 Massachusetts act. § 55 Hawaiian act. § 55 Philippine act.

¹³ Land Transfer Acts, Brickdale and Sheldon, page 287.

¹² See ante § 127.

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be rectified and the person suffering loss by the rectification shall be entitled to the indemnity.”¹⁴ Since a forged instrument is absolutely void under the general laws, it is clear that such a disposition comes within the meaning of this section.¹⁵ There seems to be no limit to the number of successive registered dispositions which may be undone if they are founded on a void disposition, provided a claim for rectification is made before it is barred by the statute of limitations. C., the registered proprietor under the English act of a charge on registered land, was supposed to have transferred the charge by assignment for value to O., who thereupon left the assignment at the land registry for registration, and he was accordingly registered as proprietor of the charge. It was afterward discovered that the assignment was a forgery by C.’s solicitor. There had been no negligence on the part of C., and O. was perfectly honest in the transaction. On a claim for rectification of the register by C., the registration of the assignment to O. was set aside. It was held that O. was not entitled to indemnity from the fund, because, by bringing the assignment of the charge to the registrar, he had affirmed, and warranted it to be a genuine document, and that by that act on his part, although innocent, he had directly brought about the registration of the charge in his name, and so had “caused or substantially contributed to the loss” within the meaning of the provision of the act, which excludes from the fund a person who “has caused or substantially contributed to the loss by his act, neglect or default.”¹⁶ It will be noted that O., the sufferer by the forgery in this case, was the person who had accepted the forged document. Though he was not entitled to compensation from the indemnity fund, a registered purchaser in good faith from him, on rectification of the register, would be entitled to indemnity.¹⁷

§ 133. Forgery by One’s Own Agent. A purchaser of a registered interest in land is bound by the acts of his agent, done in the procurement of the registration of the purchaser as the owner. A. employed B. to purchase and procure the

¹⁴ English Act, 1897, § 7 sub-section 2. See § 124 Ontario act.

¹⁵ Brickdale and Sheldon, pg. 287.

¹⁶ Attorney-General v. Odell, L. R. 2 Chan. Div. 47 (1906).

¹⁷ § 7 English act, supra.

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transfer from Y. and Z. of a mortgage on registered land. B. by misrepresentation procured a transfer of Y.'s interest in the charge, and he then forged the name of Z. to the transfer. He procured the registration of A. as the owner of the mortgage, obtained from A. the money due as the consideration of the transfer and then misappropriated the money. It was held that as B. was the agent of A. to prepare the transfer and to procure the due execution and registration of it, A. could not take the benefit of B.'s fraudulent acts. The court thereupon ordered that the certificate of title issued to A. be delivered up and cancelled, and that Y. and Z. be registered as owners of the charge.¹⁸

§ 134. Some Comment on Forgery. If a Torrens act makes a title founded on a forged instrument null and void, it renders certificates of title clearly defeasible, and tends to take away the confidence of the public in them; and if it makes a forged instrument capable of becoming the root of a new title, it upsets the long-cherished and popular tradition that a forged instrument is absolutely void for all purposes. The English theory that a landed proprietor is to be protected as far as possible in his proprietary rights may be the basis of the deep-seated and general feeling that a person ought not to lose his land, under any possible circumstances, by means of or as the result of a forgery. One who does not understand the reasons of the general rule, as to the effect of forgery under the Torrens system, may regard it as a compromise between two different policies, but the rule arises logically from certain principles of title registration. A proposed purchaser of land who becomes registered under an imposter, and not under a real registered owner, gets no title to the land, loses the money he has paid on the proposed purchase, and has no recourse to the indemnity fund.¹⁹ He has been guilty of negligence contributing to the loss, and his loss did not arise from operations under the act, because he dealt with a person who was not registered under the act, at least as to the property in question. Whatever may be the practical merits of the theory, his case

¹⁸ Ex parte Batham, registrar, 6 New Zealand Law Reports, 342 (1888).

¹⁹ Gibbs v. Messer, *supra*. Attorney General v. Odell, *supra*.

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does not detract from the general proposition that one registered under the last registered owner of an estate in land gets the title to the registered estate. Where one in good faith for value is registered as a new owner under a person who is registered with a title, invalid because it was procured by forgery, one of two innocent persons must lose the land,—either the owner from whom the transfer was forged, or the registered purchaser from the registered person, whose title was invalid while he was so registered. In the absence of any constitutional limitation on its powers, it is competent for the legislature to say which one shall have the title, and, in establishing a system of title registration, it is proper for it to declare, in favor of the last certificate of title issued under governmental authority, that the new registered owner shall have it, and that the victim of the forgery shall be left to his actions against the wrongdoer and against the indemnity fund. The English act alone declares the other way,—that a registration obtained by forgery is void for all purposes, that in case of forgery the register shall be rectified, and that the person suffering loss by the rectification shall be entitled to the indemnity.

§ 135. The Effect of Forgery in This Country. We have discussed the effect of the forgery of instruments respecting registered land as if the conditions of the law were the same in this and in foreign countries. In foreign countries the legislative power may declare that the production of the last duplicate certificate of title shall be conclusive authority to a registrar to make a new registration, and may declare also that a new registration on a transfer from the last registered owner shall be valid and shall be conclusive evidence of title. When it declares that a registration void for forgery shall become the root of a new title, in favor of a bona fide transferee for value from the owner whose certificate was issued as the result of the forgery, there is the end of it. But in this country there are constitutional limitations on the power of the legislatures to pass laws, and no law of a state may deprive any person of property without due process of law. There are many decisions of courts in this country on the question as to what is and what is not due process of law, and,

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as the system develops, the Torrens statutes of this country are likely to swell the number of them very greatly. Before it can be said that the Torrens system is a secure method of conveyancing and dealing with land in this country, it must be established firmly that such statutory declarations are valid and effective here. In order to work the system, certificates must vest an indefeasible title, and it will not do to deal with registered land under a system where any registration, no matter how far back, may be set aside as void. In England landowners cried out vehemently against a statute which gave effect to a title founded on a forgery. They were more concerned about holding the lands they had than about an improved system under which they might take title to other lands, and they refused to put their lands under the act of 1875. In framing the act of 1897 due deference was paid to this objection to the Torrens system, and a registration founded on a forgery was declared to be absolutely void for all purposes, and a person suffering loss by the rectification of the register was given compensation from the indemnity fund. This provision, making all registrations under a forgery absolutely void, greatly impairs the symmetry and effectiveness of the English system, for it is directly contrary to the cardinal principle that a bona fide transferee for value from the last registered owner holds a certificate which is conclusive evidence of title to registered land. If such statutory declarations as we have mentioned are null and void under our constitutional limitations, the American, Ontario and English systems are practically alike as to the result of a forgery, except that no recourse to the indemnity fund is given in any of the American statutes to the person who may suffer loss from the rectification of the register. It may be that Section 38 of the California act²⁰ is constitutional and valid, but for the determination of this matter, and of many questions arising under Torrens statutes, we must wait until the supreme court of the United States has rendered its decision.

²⁰ See ante, § 127.

CHAPTER XII.

Fraud—Error.

§ 136. **Fraud in Original Registration, Statutory Provisions.** The original act of Minnesota, 1901, and the act of 1905 of that state, and the Colorado and Washington acts all provide that every person receiving a certificate of title pursuant to a decree of registration shall hold the same free from all incumbrances, except such as may be noted therein, and except the statutory rights and incumbrances.¹ It will be noticed that these acts contain no exception in case the decree was obtained by fraud. The Minnesota act of 1901 provided that any person having an interest in the land, who was not actually served with process or notified of the application, and who had no actual knowledge of the application or proceedings under it, might appear in the proceeding at any time within sixty days after entry of the decree, and not afterward, and procure a review of the proceedings, except as against an innocent purchaser for value, and that no action to set aside the decree should be brought after sixty days from the entry of the decree.² The Minnesota act of 1905 extends the time for the commencement of any action to set aside the decree for any invalidity to six months from the date of the decree.³ The Colorado and Washington acts are substantially like the Minnesota act of 1901, except that the time is fixed at ninety days after the entry of the decree.⁴ Under several acts any person deprived of any interest in land by a decree

1 § 30 Minnesota act, 1901. § 24
Minnesota act, 1905. § 30 Colorado
act. § 30 Washington act.

2 § 28 & 29 Minnesota act, 1901.

3 § 27 Minnesota act, 1905.

4 §§ 28, 29 Colorado act. §§ 28,
29 Washington act.

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of registration procured by fraud may file a petition for review within one year after the entry of the decree, provided no innocent purchaser for value has acquired an interest.⁵ It is provided in some acts that the registered owner of an interest in land shall hold the same subject to the estates, liens and interests noted in the certificate and to the statutory rights and incumbrances, and free from all others, except in case of fraud to which he is a party, and except in case of the fraud of the person through whom he claims without consideration paid in good faith.⁶ Under the Illinois and Oregon acts any person having an interest in the land, who has not been actually served with process or notified of the proceeding, and who had no actual knowledge of the application or the proceedings under it, may appear in the proceeding within two years after the entry of the decree, and not afterward, and procure a review of it. There is no clause saving the rights of innocent purchasers relying on the decree, and an innocent purchaser for value during this period of two years stands in the same relation to the decree as the first registered owner.⁷ In addition to the above section, in California it is provided: "In case of fraud, any person defrauded shall have all the rights and remedies that he would have had if the land were not under the provisions of this act; provided that nothing contained in this section shall affect the title of a registered owner who has taken bona fide for a valuable consideration, or of any person bona fide claiming through or under him."⁸ In New York a registration procured by or as the result of fraud may be set aside in the same manner and by the same proceedings as in case of a deed obtained by fraud, provided there be no innocent purchaser for value without actual notice of the fraud, and provided the proceeding be commenced within ten years from the entry of the decree.⁹

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⁵ § 37 Massachusetts act. § 38 Hawaiian act. § 38 Philippine act. §§ 28, 29 Nova Scotia act.

⁶ § 40 Illinois act. § 39 Oregon act. § 34 California act.

⁷ § 26 Illinois act. § 25 Oregon

act.

⁸ § 37 California act. This provision was probably taken from § 69 South Australia act, 1886, with which this language is identical.

⁹ §§ 24, 32 New York act.

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Subject. When the original registration of a title has been procured by fraud in not notifying the owner of the land of the pendency of the proceeding, as required by the statute, the decree and the certificate of title issued under it may be vacated and set aside, unless an innocent purchaser for value has obtained rights in or title to the land on the faith of the record. As long as the title remains registered in the name of the person who was guilty of the fraud, the decree and certificate of registration may be set aside, in an action brought by the defrauded person within a reasonable time after notice of the fraud. The mere fact that the statute does not in express words declare that a registration of title procured by fraud may be set aside as between the parties, does not deprive a court of equity of its general jurisdiction to protect parties from the consequences of fraud. Fraud vitiates every transaction, and equity will not permit a person to hold the benefits of a fraudulent transaction, obtained under forms of law.¹⁰ A., living in Minneapolis, Minnesota, knew that B., living in Marshall, Michigan, held a mortgage on a certain lot in Minneapolis, and under a forged power of attorney from B., he went through the form of foreclosing the mortgage for an alleged default in the payment of interest, bought in the land and procured a deed under the foreclosure proceeding. The owner of the equity of redemption was in conspiracy with A., and the interest on the mortgage was paid to B. until after A. had procured the deed under the foreclosure. On January 23, 1904, A. applied to have his title registered under the act. It was examined and a good title was found in A. On the hearing he testified that he owned the lot free and clear from any incumbrance, and on May 11, 1904, a decree was entered, and the title was registered in A. B.

¹⁰ Baart v. Martin, 99 Minn. 197; 108 N. W. Rep. 945 (1906). In the opinion in this case it is said that the Torrens laws of Minnesota (1901), Colorado and the Fiji Islands are the only ones which do not expressly provide that fraud shall not vitiate a registration of title as between the parties. This statement does not seem to be exact. In § 14 of the

Fiji Ordinance it is provided that a certificate shall be taken by all courts as conclusive evidence that the person named therein is the absolute and indefeasible owner of the land and that his title "shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he shall have been proved to be a party," etc.

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was not served with process, and he had no knowledge of the proceeding. On October 5, 1904, for the first time, B. learned of the registration of the title in A., and he immediately proceeded to urge his right to set aside the registration on account of the fraud of A. The limitation for a proceeding to set aside a fraudulent registration was at that time sixty days after entry of the decree, and the sixty days had long passed when B. learned of the fraud. In holding that the decree should be set aside, the court said: "The important and controlling question in this case is: Can a decree of registration under the Minnesota Torrens law be attacked on the ground that it was obtained by fraud? The appellants rest their case squarely upon the words of the statute, and earnestly contend that the legislature intended to enact a law which, after the expiration of sixty days from the entry of the decree, would vest in the registered owner an absolutely indefeasible title, even though the registration was secured by the fraudulent practices of the person in whose name the land was registered. The Minnesota statute contains no express exception in favor of the owner of land which has been fraudulently registered in the name of some other person. The argument is that the importance of making the title absolutely indefeasible after the expiration of the period of limitation induced the legislature to depart from the ordinary rule, and permit a party who has been guilty of fraud to retain the benefits thereof, saving only for the defrauded landowner his right of action against the party guilty of the fraud, and a claim against the insurance fund provided for by the statute. The present case well illustrates the utter inadequacy of such remedy. The legislature never consciously provided a method by which such an unconscionable scheme might be successfully consummated. * * If the legislature intended to protect a party, who, by fraudulent means, obtains the registration of some other person's land in his name, it should have said so clearly and definitely, and left nothing to implication. It must be presumed that the legislature understood and expected that the courts of equity would remain open to parties who were able to bring themselves within the rules which require the granting of equitable relief. The fact that the statute does not expressly provide that fraud shall invalidate acts authorized to be done under it does not deprive courts of the general power to protect the rights of parties. * * * The Torrens statute makes the provisions of the general statutes relating to the vacating and opening of ordinary judgments inapplicable. A person who seeks equitable relief must, therefore,

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proceed promptly after notice of the fraud, and is, of course, subject to all the restrictions and exceptions applicable in proceedings in equity. The sixty-day limitation contained in the statute when these transactions occurred, now made six months by the act of 1905, has no application to the case at bar. If the defrauded party is not guilty of laches, he may attack the decree on the ground that it was obtained by fraud, so long as the land stands registered in the name of the party who was guilty of the fraud. No public policy requires that such a title be indefeasible, or that so tempting a reward be offered for the stealing of land under the forms of law."¹¹

§ 138. A mere misdescription of the property or a mistake as to facts, contained in an application to bring land under a foreign act is not sufficient to invalidate a certificate of title issued on the application by the registrar, but if it is evident from all the circumstances that the applicant had knowledge of the facts in the case and willfully mis-stated them, the certificate may be set aside for fraud. If a certificate was obtained by fraud and false representation, it may be set aside; If it was not so obtained, it may not be set aside. The question of the conclusiveness of a certificate depends on the settlement of this matter of fact.¹² While the statutes speak in the most general way of fraud in registration, of certificates obtained by fraud, and of fraudulent transactions, it must be noted that the fraud referred to is that of the applicant for registration or of the person registered. The act of registration is made by the state through its duly authorized officers, and it assumes to protect registered owners from the fraud and false representations of members of the public. Its general policy in registration is, in the absence of fraud on his part, to give to each registered owner an indefeasible title to an estate or interest in land. A fraud of third persons, in which the registered owner did not participate, and of which he had no knowledge, is not sufficient to avoid a registration. A. applied for the registration of certain land. His supposed deed from B., under which he claimed title, was a

¹¹ Baart v. Martin, *supra*.

¹² Wiggins v. Hammill, 4 V. L. R. L. 63 (1878). Biggs v. McEllister, 14 S. A. L. R. 86 (1880). Ogle v. Aedy, 13 V. L. R. 461 (1887). Gregory v. Alger, 19 V. L. R. 365,

15 A. L. T. 22 (1893). Saunders v. Cabot, 4 N. Z. C. A. 19 (1885). Kissick v. Black, 10 N. Z. L. R. 519 (1892). Matai v. Assets Company, 6 N. Z. L. R. 356 (1887).

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forgery, but he did not know this when he was registered. It was held that his certificate gave him an unimpeachable title as against B.¹³ As illustrating the general policy of the system, in the absence of fraud, to confer an indefeasible title on the registered owner, it has been held that where a person obtained a certificate without fraud or notice of fraud, the title is indefeasible, notwithstanding irregular or even invalid proceedings prior to the bringing of the land under the act, through which proceedings the person claimed the title, but to which he was not a party, and of the invalidity of which he was not aware.¹⁴ A merely erroneous registration will not impeach the indefeasibility of a certificate.¹⁵ This is an elementary and very important doctrine of registration of titles, and, in order to understand and appreciate the system, it must be thoroughly understood and constantly kept in mind. Of course it does not apply to the original registration of a title under the American Torrens system, where such registration is made under a decree of court. If a person is in adverse occupation of land at the time of the original registration of it, and suit is brought against him in ejectment, he may show that the registration was obtained by fraud, and the certificate will be set aside if fraud is proved.¹⁶

§ 139. Fraud, at any time, Foreign Acts. Under certain sections of some of the acts fraud, wherein the registered owner "has participated or colluded", will vitiate the certificate.¹⁷ In British Columbia, "as against a certificate of indefeasible title, any person may show fraud wherein the registered owner has participated in any degree".¹⁸ Most of the foreign acts provide that no action of ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as owner thereof, except in the cases of a mortgagee as against a mortgagor in default, a lessor as

¹³ *Coleman v. Riria Puwhanga*, 4 N. Z. S. C. 230 (1886).

¹⁴ *Matai v. Assets Company*, 6 N. Z. L. R. 356 (1887).

¹⁵ See § 148, post.

¹⁶ *Wadham v. Buttle*, 13 S. A. L. R. 1 (1879). *Staunton v. Brown*, 1 V. L. R. (L.) 150 (1875). *Harvey*

v. Williams, 18 S. A. L. R. 8 (1883). *Franklin v. Ind.*, 17 S. A. L. R. 133 (1883).

¹⁷ § 75 *Saskatchewan act.* § 42 *Alberta act.* § 71 *Manitoba act.* §

14 *Fiji Ordinance.*

¹⁸ § 81 *British Columbia act.*

against^a lessee in default, and in the case of a person deprived of any land by fraud as against the person registered as owner of such land through fraud or as against a person deriving his title or interest otherwise than as a transferee bona fide for value from or through a person so registered through fraud.^a The certificate is conclusive evidence of title until it is shown that such fraud exists, and the burden of proving fraud is on the person asserting it.¹⁹ Except as against an innocent purchaser for value, under the English and Ontario acts, any disposition of land or of a charge on land, which if unregistered would be fraudulent and void, is, notwithstanding registration, fraudulent and void in like manner.²⁰ Any entry on the register, procured to be made by fraud, is void as between all parties or privies to such fraud.²¹ Any certificate of title obtained by means of fraud or falsehood is null and void for or against all persons other than a purchaser for valuable consideration without notice.²² In the absence of actual fraud, a certificate is not affected in consequence of the holder having notice of any deed, document or matter relating to the land.²³ Several acts provide that "nothing contained in this act shall take away or affect the jurisdiction of any competent court on the ground of actual fraud, or over contracts for the sale or other disposition of land, or over equitable interests therein".²⁴

§ 140. Fraud Subsequent to Original Registration. In some of the acts in this country there is an express provision that a purchaser of land which has been registered, who takes a certificate of title for value and in good faith, shall hold it subject only to the noted and the statutory incumbrances and

^a § 205 Victorian act. § 56 New Zealand act. § 123 Queensland act. § 199 West Australia act. § 124 New South Wales act. § 69 South Australia act. § 147 Saskatchewan act. § 104 Alberta act. § 76 Manitoba act.

¹⁹ *Wadham v. Buttle*, 13 S. A. L. R. 1 (1879). *Main v. Robertson*, 7 A. L. T. 127 (1886). *Marsden v. McAllister*, 8 N. S. W. L. R. 300 (1887). *Hall v. Loder*, 7 N. S. W. L. R. (Eq.) 44 (1885). *Matai v*

Assets Company, 6 N. Z. L. R. 356 (1887).

²⁰ § 7 English act, 1897. § 98 English act, 1875. § 124 Ontario act.

²¹ § 100 English act, 1875.

²² § 125 Ontario act.

²³ § 34 Act for Ireland, 1891.

²⁴ § 51 Queensland act, 1877. § 117 Fiji Ordinance. § 126 Manitoba act. § 4 Saskatchewan act. § 139 Alberta act. § 34 Act for Ireland, 1891.

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exceptions.²⁵ In the other acts in this country the provision is general, that the registered owner, except in case of fraud to which he is a party, or in case of fraud of the person through whom he claims without a valuable consideration paid in good faith, shall hold it subject only to such incumbrances and exceptions.²⁶ The rule relative to the protection which will be afforded by a new registration is that a purchaser for value will be protected in his registered interests unless actual and moral fraud on his part is to be inferred from the circumstances under which he obtained them. A person taking a mortgage from a registered owner of land is not affected by notice of an unregistered interest in another person, whereby such person is the owner of an undivided one-half of the land, but if the mortgagor, when he executed it, expressly told the mortgagee that he owned only an undivided one-half of the land, that he only intended to mortgage his one-half, and that he intended to exempt the interest of his co-tenant, the mortgagee is guilty of fraud against the unregistered owner in attempting to enforce the mortgage against the whole land.²⁷ Fraud on the part of a vendor in acquiring his title cannot affect the statutory protection and indefeasibility of title given to a registered purchaser for value, who had no part in or knowledge of the fraud.²⁸ This rule is the same as in case of original registration.

§ 141. Fraud, Duty of Purchaser to Make Inquiries. Under the Torrens system of registering estates and interests in land, the register is everything, and, except in case of actual fraud on the part of the person dealing with the last registered owner, such person takes, on registration from such registered owner, an indefeasible title against all the world.²⁹ One of the general provisions of the Torrens acts is that, except in case of

25 § 32 New York act. § 38 Massachusetts act. 39 Hawaiian act. § 39 Philippine act. § 30 Washington act. § 30 Colorado act. § 24 Minnesota act.

26 § 40 Illinois act. § 39 Oregon act. § 34 California act.

27 Independent Lumber Co. v. Gardiner, 3 Sask. 140 (1910).

28 Cullen v. Thompson, 5 V. L. R.

147 (1879). Gregory v. Alger, 19 V. L. R. at page 573 (1893). Coleman v. Riria Puwhanga, 4 N. Z. S. C. 230 (1886).

29 Fels v. Knowles, 26 N. Z. L. R. 604 (1906). Western Co. v. Freeman, 7 W. A. L. R. 22 (1905). Registrar v. Price, 24 N. Z. L. R. 291 (1905).

fraud, no person taking a transfer of registered land, or any interest therein, from the registered owner shall be held to inquire into the circumstances under which, or the consideration for which such owner or any previous registered owner was registered, or shall be affected with notice, actual or constructive, of any unregistered trust, lien or interest, and that the knowledge that any unregistered trust, lien or interest is in existence shall not of itself be imputed as fraud.³⁰ It is evident that this section applies to transferees for value only, and not to volunteers. Persons who take without valuable consideration are not entitled to hold the land as against those whose rights have been prejudiced by the transfer. This provision is designed for the protection of purchasers who deal on the strength of the register and obtain registration with knowledge of existing unregistered interests in the land, but have no reason to think that the holders of such interests will be damnified by the registration. The theory is that since the holders of such interests have not placed them, or notice of them, in the register, purchasers may assume that they do not intend to urge them.

§ 142. This section does not provide that the person dealing with a registered proprietor is not affected with constructive notice of a breach of trust, but only that he is not to be affected with notice of the trust. Though the section provides that he is not concerned to inquire, it does not provide that, if he is informed of such breach without inquiry, he shall not be affected. In order to defeat the title of a person dealing with a registered owner, fraud on his part is necessary. The fraud must be actual, not merely constructive. The taking of a transfer of the land in the face of knowledge of the existence of a trust affecting the land is of itself a constructive fraud. While gross negligence of the rights of another person in property is often treated as the equivalent of fraud, still there is a well defined distinction between gross negligence and fraud.

30 § 42 Illinois act. § 41 Oregon act. § 36 California act. § 34 New York act. § 173 Saskatchewan act. § 135 Alberta act. § 91 Manitoba act. § 43 New South Wales act. § 189 New Zealand act.

§§ 186, 187 South Australia act. § 109 Queensland act. § 140 Victoria act. § 134 Western Australia act. § 114 Tasmania act. § 34 Act for Ireland, 1891.

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The section selects an extreme case of gross negligence and says that even this of itself shall not be imputed as fraud. This indicates a clear intention to oppose fraud to gross negligence and to establish that the term fraud here indicates actual fraud, or want of personal good faith on the part of the transferee. If the term fraud here includes constructive fraud, the section would in effect say that except in case of fraud, actual or constructive, a transferee shall not be affected by constructive fraud. The matters by which the transferee is not to be affected cover pretty well the whole ground of constructive fraud. This involves a contradiction and is not to be considered in determining the meaning of the section.³¹ Although a purchaser from a registered owner is not affected by knowledge of the mere existence of a trust or unregistered interest, he is affected by knowledge that the trust is being broken, or that the owner of the unregistered interest is being improperly deprived of it by the transfer under which the purchaser himself is taking. His acting must be judged by considering what, with the knowledge he possessed, it was reasonable that he should believe respecting the good faith of the transaction. Where the circumstances are such as should raise in his mind a strong suspicion that the transaction in which he is engaged is a fraud on the right of another, he is bound to go no further in it without full inquiry. To omit such inquiry is a want of honest dealing, and he will not be entitled to shelter himself under the provisions of the section under discussion.³²

§ 143. The rule with regard to purchasers from trustees is that the mere fact, that a person dealing with a registered owner knows that such registered owner is a trustee under a will or other instrument, does not make it necessary for him to make inquiries as to the powers of the trustee, unless there is something in the nature of his dealings with the trust property to give him notice of the fact that the trustee is dealing

³¹ *Smith v. Essery*, 9 N. Z. L. R. 449 (1890). See *Saunders v. Cabot*, N. Z. L. R. 4 C. A. 19. *National Bank v. Company*, N. Z. L. R. 3 S. C. 257. *George v. Society*, N. Z. L. R. 4 S. C. 165. *Kirkpatrick v.*

Hutchinson, 23 N. Z. L. R. 665 (1904). *Colonial Bank v. Pie*, 6 V. L. R. Eq. 186 (1880).

³² *Locher v. Howlett*, 13 N. Z. L. R. 584 (1894).

fraudulently with it.³³ The register is the pivot on which the whole Torrens system turns, and the general rule is that a person has a right to rely on the face of it, so long as he is acting in good faith, and that he may not be required to make inquiries outside of the register. Mere knowledge that there are outstanding unregistered rights is not sufficient of itself to impair the title of a new registered purchaser. There are instances under the general law where a person acting in good faith may rely on a public record, notwithstanding he may have notice of outstanding equities in third persons. The suing out of a writ of error, without a supersedeas, does not change the rule of law that, until a decree of court has been reversed, everyone may act on it as a valid decree. Any rights acquired in good faith by strangers to the record, whether with or without notice of a pending writ of error, cannot be affected by its reversal. A purchaser of the land will be protected, even though, when he paid out his money, he knew that a writ of error was pending to reverse the decree.³⁴ But registration acts are not intended to abolish the whole principle of notice, and where one dealing with registered land has notice or knowledge that a transfer of the land to him will operate as a fraud on the rights of others, he cannot longer act in good faith and claim the protection of this section.

§ 144. The fraud which must be proved in order to invalidate the title of a registered purchaser for value is actual fraud, dishonesty of some sort, mala fides, the shutting of his eyes to what he might have seen if he had been willing to look. It must be brought home to the person whose registered title it is sought to impeach, or to his agent. Fraud by persons from whom he claims does not affect him unless he or his agent had notice of it. The mere fact that he might have found fraud if he had been more vigilant and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. If however it is shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is different, and fraud may be ascribed

³³ Fels v. Knowles, 26 N. Z. L. R. 604 (1906). rett, 239 Ill. 297; 87 N. E. Rep. 1009 (1909).

³⁴ C. & N. W. R. R. Co. v. Gar-

to him.³⁵ Fraud in this section means moral turpitude and actual dishonest dealing.³⁶

§ 145. The statutes of England and Ontario do not abrogate the doctrine of constructive notice and in terms enact that except in case of fraud no notice of equitable interests shall affect a person dealing with the land. Perhaps it may be inferred from this that the equity doctrine that notice is fraud prevails in these jurisdictions. But the general scheme of the register is that it contains all that a prospective dealer need know about the main title, and that he may rely on it and assume that the holder of any unregistered rights or interests does not desire to protect them by giving notice of them on the register. If these rights or interests are such as are entitled to registration, the prospective dealer with the title ought to be able to assume that they are not to be actively prosecuted, and if they are not entitled to be registered, his mere knowledge of their existence ought not to affect his right to acquire the title. The words of the statute^a are clear, that "knowledge of any trust or unregistered interest shall not of itself be imputed as fraud". It is evident that the scope and idea of this provision is to facilitate dealing with real property.³⁷ From this provision it seems to follow, that where the holder of an unregistered interest in land has the right, by the filing of a caveat or caution, to prevent any dealing with the land, he must give notice of his interest on the face of the register and not otherwise. It has been held that a person having unregistered rights in land under a lease, who knows that the title is about to be transferred, must file a caveat in order to protect his rights, and that a mere notification to the intending purchaser that he holds a lease is not sufficient to invalidate the certificate of the transferee.³⁸ It also seems to follow from the

³⁵ *Assets Co v. Mere Rochi*, 1905 A. C. 177. *Cooke v. Union Bank*, 14 N. S. W. L. R. 280 (1893). *Crow v. Campbell*, 10 V. L. R. E. 186; 6 A. L. T. 34 (1884).

³⁶ *Gregory v. Alger*, 19 V. L. R. 365; 15 A. L. T. 22 (1893). *McAllister v. Biggs*, 8 App. Cas. 314 (1883), *P. C. Lake v. Jones*, 15 V. L. R. 728 (1889). *Thomson v.*

Finlay, 5 N. Z. S. C. 203 (1886). *Kirkpatrick v. Hutchinson*, 23 N. Z. L. R. 665 (1904). *Strang v. Russell*, 24 N. Z. L. R. 916 (1906).

³⁷ *Cooke v. Union Bank*, 14 N. S. W. L. R. Eq. 280 (1893).

³⁸ *Oertel v. Hordern*, 2 St. Rep. (N. S. W.) Eq. 37 (1902). *Lake v. Jones*, 15 V. L. R. 728 (1889).

above provision that where the holder of an unregistered right in registered land is entitled to have it registered, an intending purchaser is not bound by notice of it. For instance, no proceeding in court or under any legal writ is valid against a transferee for value until after entry thereof is made on the register, notwithstanding he may have had actual or constructive notice of it.³⁹ The trouble seems to be with beneficial interests, when the registered owner holds the title, not for his own benefit, but for others. The doctrine of equitable estates and interests in land is so deeply imbedded in our jurisprudence and is so useful and necessary to a scientific dealing with real estate that legislatures and courts, while declaring that they may not be registered under the Torrens system, are still unwilling to say that the registered estate or interest is the only estate or interest in land. Confusion and uncertainty flow from the fact that although notice of a trust may not be placed on the register, notice concerning the terms of it, which comes to an intending purchaser from any other source, may invalidate the acquisition of the title. As has been said, the scheme of the register of titles is the pivot of the whole scheme of registration of titles, and unless it can be stated with exactness and understood with certainty, the entire system of registration is lame and faulty. The subject of the protection which is to be given to a purchaser for value with notice of unregistered rights and interests has been before the Australasian courts many times during the last fifty years, and the cases are not in harmony. Some cases, especially those of New Zealand, hold that it is fraud to acquire a registered title with knowledge of an unregistered right or interest which will be defeated thereby, and that a certificate of title taken in the face of such knowledge is voidable.⁴⁰ These cases are in conflict with the decisions which were considered in the sections immediately preceding this, and they tend to obscure and confuse the whole subject.

39 § 139 Victorian act. § 133 Western Australia act. § 105 New South Wales act. § 94 Tasmania act. § 106 South Australia act. § 64 Ontario act. § 86 Illinois act. § 85 Oregon act. § 92 California act. § 34 Act for Ireland, 1891.

40 *Merrie v. McKay*, 16 N. Z. L. R. 124 (1897). *Louden v. Morrison*, 14 N. Z. L. R. 245 (1895). *Bell v. Beckman*, 10 N. S. W. Eq. 251 (1889). *Gilbert v. Bourne*, 6 Q. L. J. 270 (1895). It was so held in several earlier cases.

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If it be said that perhaps the courts in these cases merely intended to find that fraud was to be inferred from the acquisition of the title under the circumstances of each transaction, it must be answered that the general doctrine as stated above was broadly laid down. It is certainly true that each transaction, when questioned, must stand the tests of an examination for fraud, and that in each case it is a question of fact whether there was fraud in the dealing; but it is vital to the system of registering titles that there be a firm adherence to the proposition that, in the absence of fraud, a prospective dealer with a registered title need not look beyond the register.

§ 146. No trust or notice of the particulars of a trust may be registered under the system. A person dealing with a registered owner will not discover from the face of the register that the latter is a trustee. If a bona fide purchaser for value discovers from some source other than the register that the registered owner is a trustee, he need not inquire into the terms of the trust, but if he receives notice or knowledge that the trustee, in transferring the title, is violating the terms of the trust, his registration is voidable for fraud. This scheme of dealing with titles is not clear cut and definite. It gives rise to too many distinctions, too much refinement and too much uncertainty. It leaves transactions to be investigated and determined by parole and circumstantial evidence. In practice a purchaser should determine whether a registered owner holds in his own right or as trustee, and, if he holds as trustee, the purchaser should have the terms of the trust examined by competent counsel. Such a practice would amount to a registration of the terms of the trust. The registration of land "in trust," as provided for in the American acts and in the act of Nova Scotia, may not tend to facilitate dealings in land, but it removes a cause of confusion and uncertainty in such dealings.⁴¹

§ 147. **Errors and Mistakes.** Most of the Torrens statutes make elaborate provisions for the correction of errors and omissions in certificates of title, and for the rectification of the

⁴¹ See *St. Germain v. Renault*, 2 Alta. 371 (1909).

register. The provisions in the Australian and Canadian acts differ from those in the English and Ontario acts, and the American acts have little to say on the subject in a definite way. On reading over the provisions of many foreign acts, concerning errors and mistakes, one is apt to conclude that in case of error, where no intervening rights of third persons arise, the registrar, as a matter of course, may call all interested persons before him and make such corrections as are just and proper in the register, and in the duplicate certificate, and that, if he experiences any difficulty in any way in doing this, he may refer the subject to the court, which will compel the attendance of all persons interested and straighten out the whole matter. But the subject of error in registration of titles is an intricate and difficult one, and a study of the several statutes will show that there is a wide difference in the way in which errors are to be corrected, and in the effect which is to follow from corrections when made. One test of any system of dealing with titles lies in the way in which errors are overcome and adjusted. Any system is good enough to carry with safety and ease the transactions which are regular and within the contemplated lines, but a good system is one which adjusts errors in such a manner as not to throw its mechanism into disorder. The method of the American Torrens system, in providing that the correction of errors shall be made only on an order of court, is not only cumbersome and expensive, but it takes the whole subject out of the Torrens system and places it at once in the judicial system of dealing with titles. The New York method of ignoring the whole subject calls to mind the proverbial reasoning of the ostrich. Under a system of formulary laws, where the design is to produce a certificate which shall evidence an indefeasible title, errors will often arise, and the effect of them is bound to be drastic and severe. In practice they are often corrected with the consent of all persons concerned, but when persons stand on their legal rights, as set forth in an erroneous register, the effect is sometimes rather startling to one who is acquainted only with the principles of equity jurisprudence under the recording system. With regard to the power of examining into and correcting errors in certificates of title, there

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is one broad and general rule, that such a power may not be exercised to the prejudice of a bona fide transferee or mortgagee for value.⁴² One great virtue of the Torrens system is the principle that, in favor of bona fide third persons for value, the entries on the register are conclusive, no matter what fraud, error or latent equity may lie behind them. Of course, there can be no rectification in any case where the act declares the certificate to be conclusive evidence of title, and where the person injured by the error cannot recover the land.

§ 148. Error in Original Registration in Foreign Countries.

It is now necessary to inquire concerning the effect of an error in registering the title to a piece of land when it is brought under an act. What is the effect when a person applies to register a certain piece of land which he does not own, or of which he does not own a part, and obtains such registration merely in error and without any fraud on his part? In Australasia there are a few cases holding that, though a person so registered in error holds a prima facie title which may be dealt with by a bona fide purchaser for value, yet his own title, while he holds it, may be set aside by proper proceedings on the part of the person who is rightfully entitled to the land; that such registered person is a trustee for the rightful owner, and that this resulting trust may be enforced as between the parties.⁴³ As a general statement, this view seems conscientious and just, but a system of title registration must be conducted on the principle that, in bringing land under the system, and in passing on all legal questions leading up to the registration, the registrar can make no error which will prevent the vesting of an indisputable title in the first

⁴² *In re McCarthy*, 19 N. Z. L. R. 545 (1901).

⁴³ *Ogle v. Aedy*, 13 V. L. R. 461 (1887). *Mere Roihi v. Assets Co.* 21 N. Z. L. R. 691 (1902). *Solicitor-General v. Mere Tini*, 17 N. Z. L. R. 773 (1899). In England doubts have arisen as to the position of a first registered proprietor with absolute title as regards defects in the title prior to his registration. It appears to be open to question whether having regard to §§ 95 and 96 of the principal act,

a first registered proprietor, although registered with absolute title, cannot be ousted by an adverse claimant who can prove that he would be entitled to the registered land if registration had not intervened, in other words, whether he cannot be ousted by a claimant under the title prior to registration. Second and Final Report of the Royal Commission on the Land Transfer Acts, 1911, pg. 30, par. 57.

registered owner. For the purpose of registering indefeasible titles we must recognize the doctrine that, in performing his judicial functions in registration, the registrar can make no error of law which may be litigated, just as in a monarchical government we must recognize the doctrine that civilly the king can do no wrong. According to the necessities of the Torrens system, when a title is submitted to the proper governmental authority under an application for registration, this officer examines it and passes on it once for all, and when he has registered it, it may never be examined again for the purpose of affecting or disputing the registration, for the state declares that his certificate vests in the registered owner an indefeasible title as against all the world. It cannot be set aside on the ground of want of notice or of insufficient notice of the application to register the land, or on account of any error, omission or informality in the application, or in the proceedings under the application. The certificate is indisputable evidence of title, not only in favor of a bona fide purchaser for value under it, but also in favor of the registered owner, unless it falls within one of the exceptions. In speaking generally, we are accustomed to say that, except in case of fraud, the person named in a first certificate is the owner of the land described in it. The proposition as stated assumes that the certificate is not the subject of certain errors of fact, but stated in full it is as follows: Where the registered owner has not been guilty of fraud, the first certificate of title is conclusive unless it contains land misdescribed in the application, or unless a certificate of an earlier date is in existence. Under the American system the proceeding in original registration of a title is hostile litigation in court, intended to establish and declare the title in an applicant as against all the world, but it bars only the rights and interests of those who are parties to the proceeding. In foreign countries, while the proceeding in original registration is less solemn than it is here, the purpose is the same, and it accomplishes its purpose more thoroughly and directly. When the registrar, in the performance of his functions under a foreign act, issues his certificate, whether it is correct as a matter of law, or whether it is wholly or partially in error,

it evidences an indefeasible title for all purposes in favor of the registered owner, even though he had no title at the time of his registration, and would have no title at all, but for his certificate.⁴⁴ In other words, the act of registration in foreign countries is an adjudication on the rights of all persons in the land, and, unless there is an appeal from his act, the statutory declaration of indefeasibility of title makes his certificate conclusive, even though it be erroneous as to the status and condition of the title. The mere erroneous first registration of a title in a person is not a ground which can be urged by the true owner for an impeachment of the certificate. If this were not the rule, the statutory declaration would not mean what it says so plainly.⁴⁵

§ 149. Misdescription of Parcels or of Boundaries. Apart from other considerations, a certificate is conclusive except so far as regards any portion of land which by wrong description of parcels or of boundaries may be included in it. It is not conclusive as to a person claiming any land included in it by misdescription of other land, or of the boundaries of other land contained in it. Where there is a misdescription of the property in an application, and the registration of the property has been made according to the misdescription, the

⁴⁴ *Assets Company v. Mere Roihi*, 1905 A. C. 177, Privy Council, reversing the supreme court of New Zealand in *Mere Roihi v. Assets Co.*, supra, and expressing regret that there should be any division of opinion on a principle so vital to the system. *Bonnin v. Andrews*, 12 S. A. L. R. 153 (1878). *Coleman v. Riria Puwhanga*, 4 N. Z. S. C. 230 (1886). *Hamilton v. Iredale*, 3 St. Rep. (N. S. W.) 535 (1903). § 42 New South Wales act. § 55 New Zealand act. § 44 Queensland act. § 68 Western Australia act. § 74 Victorian act. §§ 33, 40 Tasmania act. § 69 South Australia act. § 37 Nova Scotia act. § 76 Manitoba act. §§ 75, 180 Saskatchewan act. §§ 44, 104 Alberta act.

⁴⁵ The owner of certain land died intestate. His son, representing himself as the owner, fraudulently applied to register the land

and received a certificate of title. In favor of a third person, this was afterward declared to be evidence of an indefeasible title in the son. *Anderson v. Davy*, 1 N. Z. S. C. 302 (1882).

A. purchased a tract of land and received a deed purporting to be signed by B. The deed was a forgery, but this fact was not known to A., who afterwards filed an application and had his title registered under the Torrens act. Subsequently B. discovered that A. claimed to own the land and had his title registered, and he brought suit to recover the land and to set aside the registration. It was held that the registration in good faith made A's title unimpeachable. *Coleman v. Riria Puwhanga*, N. Z. L. R. 4 S. C. 230 (1886).

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certificate does not vest in the registered person the title of the property in respect of which the misdescription has been made. Where land is erroneously described in the application and included in the certificate, the legal estate remains in the true owner, and he may bring an action to recover it from the first registered owner, so long as the latter has not parted with the title for value. Where there is a pure mistake in the description of parcels or of boundaries of land in an application, and in the certificate granted on it, the true owner cannot be deprived of the land by the registration, while the title remains in the first registered person, but if the latter has parted with the land to a bona fide transferee for value, the owner cannot recover it.⁴⁶ This is the same principle which applies in case of fraud, or in case of successive registration effected on the faith of an invalid instrument. The registration affected by the evil may be set aside, but the next registration is valid and confers an indefeasible title. It is easy enough to state the principle underlying misdescriptions of land and to say that any case which falls within it is an exception to the conclusiveness of a certificate of title, but it is not easy to say just what is a pure mistake in description, and what is an error of title. In *Marsden v. McAlister*, *supra*, a piece of land was definitely described in the application and in the certificate by metes and bounds, but by the error of a surveyor one line was put fourteen chains too far to the south, and the description included a strip of land belonging to a neighbor of the applicant. After registration of the land the neighbor brought suit to recover the strip of land. It was held that this was not a mistake of title, but was a pure mistake of description made by the surveyor, and that registration did not divest the title from the true owner. This decision is manifestly vague, and it is not a satisfactory illustration of the rule which we are considering. It was afterward said that, though this case was rightly decided on the facts, the principle of the decision should not be extended.⁴⁷ In explaining the rule with regard

⁴⁶ *Marsden v. McAllister*, 8 N. S. W. L. R. 300 (1887). *Rourke v. Schweikert*, 9 N. S. W. L. R. Eq. 152 (1888). *Hay v. Solling*, 16 N. S. W. L. R. 60 (1895).

⁴⁷ *Hamilton v. Iredale*, 3 St. Rep.

to misdescription of land, it was said: "If I apply to bring Blackacre (to which I am entitled) under the act, and in my application, or in the certificate, Blackacre is misdescribed, so that a certificate is issued to me of the adjoining Whiteacre, or of Blackacre plus a strip of Whiteacre, there is plainly a misdescription of parcels or boundaries, which can be rectified as against me or any volunteer claiming under me. If, however, I apply to have land to which, in fact, I have no title, brought under the act, and a certificate is issued to me of that land, it is not a case of misdescription of parcels or boundaries. Misdescription is where, intending to describe A, I describe B, or so describe A as to make it include B; but it is no misdescription if I describe correctly the land I am applying for, though the land is not mine. It is then a case, not of misdescription, but of no title, and the position depends on my conduct in the matter. If I tried to get a certificate of land to which I knew I had no title, that would be fraud on my part, and in such case, under the express terms of the act, neither myself, nor volunteers claiming under me, can claim to be protected by the certificate. If, however, I acted bona fide, believing, however mistakenly, that I had a title to the land applied for, then the case does not fall within any of the exceptions to the efficacy of the certificate."⁴⁸

If all the property described in the application is not described in the certificate of title, it is evident that the error will not affect the conclusiveness of the certificate as to the property described in it, but when the certificate includes land not described in the application, there is a misdescription which renders it inconclusive as evidence of title to the land not described in the application. In British Columbia a person may show that any part of the land is, by wrong description of boundaries or parcels, improperly included in a certificate.⁴⁹

§ 150. What is Not a Misdescription of Parcels or Boundaries. Where there is no misdescription of parcels or boundaries at all, and the registrar was satisfied on the evidence before him, whatever that may have been, that the applicant had made out a good title to a piece of land correctly described in the application, and has granted him a certificate for the land described, the case does not fall within the exception. The rule is that where registration of a particular

(N. S. W.) 535 (1903).

⁴⁸ Hamilton v. Iredale, *supra*.

⁴⁹ § 81 British Columbia act.

piece of land has been applied for, and that particular piece has been registered, there is no misdescription of the land. It is not a case of misdescription where the applicant correctly described the land, which he applied to register and which he procured to be registered, even though it was not his land when he made the application. Before the registration it was simply a case of the applicant having no title to the land, and the efficacy of the registration of the title in the applicant, depends on his good faith. While fraud vitiates a registration, yet the merely erroneous certification of an invalid title as good and valid, will afford no ground for impeaching the statutory title of a person registered as owner, even if he would have no title to the land, except for his registration. The idea and purpose of title registration is to give conclusive evidence of an indefeasible title to land, and courts must lean in favor of the indefeasibility of a title which has been registered. While some acts provide that they shall be construed liberally, so far as may be necessary for the purpose of effecting their general intent, no act even suggests that it shall be so construed as to do exact justice in all cases. Through operations under the system, and through the creeping in of some error in registering a title, an occasional injustice may be brought about; but if a registration, made by a registrar after due examination and adjudication, is to be set aside merely on the ground that an error of title has occurred, the whole system may as well be abolished. "If the applicant has no title at all, and the descriptions in the application and in the certificate of title as issued are identical, the error is not one of misdescription but of title, and the certificate of title is not ipso facto void; in such a case a defendant registered proprietor is entitled to rely on his certificate of title, and cannot be called upon to prove his title."⁵⁰

§ 151. Person Registered in Error Liable For Damages. Where a person in good faith applies to register certain land which does not really belong to him, and the registrar, after examination of the title, issues a certificate to him for it, the title is indefeasible in him. But while his title may not be

⁵⁰ Hogg, Australian Torrens System, p. 829.

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impeached or set aside on the ground of mere error in registering him as the owner, it must not be supposed that he may keep the land without responding in damages to the person wrongfully deprived of it. He is liable for the value of it, to the person ousted of the right of ownership. In case the writ of execution against him is unavailing, the person so ousted is entitled to compensation from the indemnity fund for the damage sustained by the bringing of the land under the act. When a person procures a registration fraudulently he is liable to the person injured until the action is barred by the statute of limitations, but where he acts in good faith and is erroneously registered with a title which does not really belong to him, upon a transfer of the land bona fide and for value, he ceases to be liable for damages to the person injured by the erroneous registration.⁵¹ It is a fixed principle of the Torrens system that nothing contained in any act may be so interpreted as to leave subject to any action for recovery any mortgagee or purchaser for value.

§ 152. Erroneous first Registration in this Country. These principles relating to misdescriptions of parcels or boundaries do not apply to original registration in this country. The declaration and certification of a title is founded on a decree of registration, and the force and effect of this decree depend upon the jurisdiction of the court over the person of the true owner of the title in the proceeding in which it was rendered. Errors in the description of land contained in the decree are governed by the rules relating to the correction of decrees of court, and by the limitation prescribed in the act for proceedings to set aside or modify the decree. And there is another important difference between the erroneous registration of a title in this country and in foreign countries. If an invalid title was erroneously registered here, and the true owner was not a party to the proceeding, the subsequent registration of a person as the owner in succession to the first registered owner will not create a new and valid title, even though he was a transferee for value and in good faith.

⁵¹ § 126 New South Wales act, sub-sect. 4. § 204 South Australia act. § 125 Tasmania act, § 207

Victorian act. § 201 Western Australia act. See post, § 195.

§ 153. Earlier Certificate in Existence. A certificate is not conclusive evidence of title if it is shown that the same land had already been registered, and that an earlier certificate for the same land is in existence. Where two certificates purport to include the same land, the earlier in date prevails.⁵² This rule is modified to this extent, however, that if it clearly appears from the ordinary rules of construction of written instruments that the land was included by mistake in the earlier certificate, the mistake may be rectified, and the later certificate may be permitted to prevail.⁵³ In successive registrations, where more than one certificate is issued in respect of a particular estate or interest in land, the person claiming under the prior certificate is entitled to the estate or interest; and that person is deemed to hold under the prior certificate, who is the holder of, or whose claim is derived directly or indirectly from the person who was the holder of, the earliest certificate issued in respect thereof.⁵⁴ While the acts in this country do not expressly cover the case of the issue of two certificates for the same land, they provide that a registered owner shall hold the title, and the effect of this undoubtedly is that where two certificates purport to include the same registered land, the holder of the earlier one continues to hold the title.

§ 154. Error in Including Unregistered Land. If, in the original or in any subsequent certificate, the registrar by mistake describes land which has never been brought under the act, the title of the true owner of the land is not divested. Land is not affected by operations under the system unless there has been an application to register it, and registration has been made pursuant to such application. Ejectment may be maintained against a registered owner by the true owner to recover the possession of land which has never been brought under the act, but which has been erroneously described in a

52 §§ 42, 124 New South Wales act. §§ 44, 123 Queensland act. §§ 55, 56 New Zealand act. § 69 South Australia act. §§ 33, 40 Tasmania act. §§ 74, 205 Victoria act. §§ 68, 199 Western Australia act. Oelkers v. Merry, 2 Q. S. C. R. 193 (1872). Miller v. Davy, 7 N. Z. L. R. 155 (1889). Lloyd v. Mayfield,

7 A. L. T. 48 (1885). § 95 English act, 1875. § 7 English act, 1897. § 119 Ontario act. §§ 75, 180 Saskatchewan act. § 44 Alberta act. § 76 Manitoba act.

53 Overland v. Lenehan, 11 Q. L. J. 59 (1901). Pleasance v. Allen, 15 V. L. R. 601 (1889).

54 See §§ 72, 76 Manitoba act.

certificate. The person taking the first certificate containing the error may possibly have no recourse to the indemnity fund, because he failed to note the error. However this may be, it seems certain that a transferee from him bona fide and for value would have access to the fund for compensation. In this country all instruments relating to unregistered land must be filed in the recorder's office, and unregistered land cannot be affected by operations in the registrar's office.

§ 155. Error in Matter of Law on Transfer in Succession. We have seen that, according to the principles of the Torrens system and under foreign acts, when a title is presented to the registrar for original registration, and he passes upon it and registers it, the statutory indefeasibility of title is conferred on the certificate issued by him, even though in his conclusion on the validity of the title he made an error of law; that the merely erroneous certification of the title by him does not affect this indefeasibility, and that the holder of the certificate has a good title to the land by virtue of the statutory declaration, in spite of the fact that he had no title at all, or no such title to the land, before he obtained his certificate. It is the function of the registrar to determine questions of title, and his mere error of judgment on a question of title does not invalidate the certificate. According to the same principles and under foreign acts, it is the function of the registrar to pass on the validity and legal effect of all instruments of title respecting land already registered and thereby to bind the rights of all interested persons. His functions are the same whether he brings land under the act by original registration, or whether he registers one owner in succession to another registered owner. There is no distinction or difference, with respect to indefeasibility of title, between the first certificate and any subsequent one issued by the registrar. A right of appeal is given in the matter of a registration in succession, and subject to an appeal from his decision, when the registrar passes on the validity and legal effect of an instrument executed by the last registered owner, and makes a registration of it, the statutory indefeasibility of title is conferred on the certificate, even though he erred in his judgment and by his registration vested in the new owner a title

which he was not entitled to under the terms of the instrument of transfer.⁵⁵ Some of the earlier cases in Australasia did not recognize this doctrine⁵⁶ and regarded an error of law made by the registrar in his interpretation of an instrument just as they would regard an error made by him in stating a fact on the face of the register. But the Privy Council of England in *Assets Company v. Mere Roihi*, *supra*, makes clear the principle as stated. It has not been established by a line of decisions treating it from several points of view, but it is evident that such an error may not be reached by a proceeding to rectify the register, and correct the error, and that it can only be remedied by appeal from the decision of the registrar. None of the statutes prescribes any time within which such an appeal must be taken, and it is therefore an open question whether an appeal may be taken at any time, so long as the person registered in error holds the title, or whether it must be taken at the time the registration is made. By all analogies it should be taken at such a time as to be part of the act of registration. If no appeal is taken and noted on the register, the certificate of title is conclusive in favor of the person registered, and in favor of any transferee taking subsequently under him. The statutory declaration of conclusiveness of a certificate operates on all certificates alike, whether the first or any subsequent one, and a mere error of title will not vitiate a new certificate issued in succession to a former one on a transfer of the land. While the person registered under the erroneous certificate may keep the title, he must respond in damages to the true owner for the value of the interest or estate wrongly vested in him, provided an action is brought against him before he sells the land in good faith.

§ 156. Error in Noting Mortgages and Charges. If a registrar makes a memorial of a mortgage on the register as securing an indebtedness of \$500., when in fact it secures an indebtedness of \$5,000., and the mortgaged property is transferred to a new registered owner for value in good faith, relying on the face of the register, one of two results will follow: Either

⁵⁵ *In re Okirae Block*, 10 N. Z. L. R. 677 (1892). *Assets Company v. Mere Roihi*, 1905, A. C. 177, P. C.

⁵⁶ *Ex parte Bond*, 6 V. L. R. L. 458 at page 463 (1880). *In re Car-gill*, 7 N. Z. L. R. 481 (1889).

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the mortgagee will lose his lien to the amount of \$4,500. and interest on that sum, or the new owner will take the property subject to the lien of \$5,000. and interest. Since the general design of the Torrens system is to protect the new registered owner in his registered interests, one is inclined to jump to the conclusion that the mortgagee would lose his lien pro tanto, and that the new owner would take the title subject to the lien of \$500. only. But this general design, like the theory that title follows the issue of a new certificate, must not be relied on too implicitly. It seems that a memorial of a mortgage noted on the register is a mere note of reference, and, that a purchaser is bound to search the original instrument. If it is his duty to inspect the original mortgage in order to find out the terms and conditions thereof, the mistake on the register would have been discovered by search, and the neglect to search will make the land subject to the mortgage of \$5,000., and will also constitute such contributory negligence as will bar him from recovery from the indemnity fund.⁵⁷ It is apprehended that in noting a mortgage on the register the registrar acts judicially, but the whole subject of the security afforded to mortgagees is so vague and unsettled that much complaint and dissatisfaction with the Torrens system has arisen in England.

In foreign jurisdictions, where a registrar, after having searched his list of registered owners, or on the suggestion of the judgment creditor, notes a judgment on a certificate of another person of the same name as the judgment debtor, it may or may not be that the notation may be set aside by a proper proceeding for that purpose by the holder of the certificate; there is no decision on this point. But in such a case where there has been a sale of the land to the judgment creditor on execution, and he has registered his transfer, and has sold

⁵⁷ If such a mistake is made in recording the mortgage under the recording system, in some states a subsequent purchaser for value in good faith will take the property subject to the lien of \$500. as recorded, but in other states he will take it subject to the actual indebtedness of \$5000. as shown in the mortgage. In some jurisdictions a

mistake of the recorder in transcribing an instrument does not affect the rights of the mortgagee, but in others the contrary rule obtains, and the burden is cast on the grantee in an instrument to see that it is properly recorded. *Devlin on Deeds*, 2nd. Ed. §§ 680-690. See *Prouty v. Marshall*, 225 Pa. 570; 74 Atl. Rep. 556 (1909).

the land to a new transferee, the latter takes a valid title.⁵⁸ It does not seem possible that the validity of such a title may be sustained in this country.

§ 157. Correction of Errors in this Country. In several of the acts in this country it is provided that no erasure, alteration or amendment shall be made upon the register of titles after the entry of a certificate of title, or of any memorial thereon, and the attestation of the same by the registrar, except by order of the court; that a registered owner or other person in interest may apply at any time by petition to the court upon the ground that an error or omission was made in entering a certificate or any memorial thereon, or on any duplicate certificate; that the court may hear and determine the petition after notice to all parties in interest and grant proper relief; but that the provisions of the section shall not give the court authority to open the original decree of registration, and that nothing shall be done or ordered by the court which will impair the title or other interest of a purchaser who holds a certificate for value and in good faith, or of his heirs or assigns, without his or their written consent.⁵⁹ In California it is provided that whenever it appears to the registrar that there is an error or omission in any certificate or memorial, he may apply to the court for an order summoning all persons registered as interested in the lands to appear and produce their duplicate certificates and show cause why such mistake or omission should not be corrected. With the consent of all parties the court may order any such error, omission or mistake to be corrected by the registrar, but if the parties fail to appear or do not consent, the court may proceed to hear the matter and to order such correction to be made by the registrar. If the error or mistake was caused by the fault or neglect of the registrar, the costs shall be paid by the state; if by the fault of any person registered as interested in such land, the costs shall be paid by such person.⁶⁰ No pro-

⁵⁸ Hassett v. Bank, 7 V. L. R. L. 380; 3 A. L. T. 38 (1881). See Ante § 116. In so holding the court says that the judgment creditor obtained a valid title by his registration.

⁵⁹ § 69 Minnesota act. § 89 Colorado act. § 88 Washington act. § 107 Massachusetts act. § 108 Hawaiian act. § 112 Philippine act.

⁶⁰ §§ 97, 98, 99 California act.

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vision is made in this connection, saving the rights of a purchaser for value and in good faith, and no rule or basis is laid down for the court to proceed upon in fixing the rights of the parties. In Illinois and Oregon whenever any person interested in registered land shall be entitled to have any certificate, memorial or other entry upon the register, cancelled, removed or modified, and the registrar or other person whose duty it shall be to cancel, remove or modify the same shall upon request fail or refuse so to do, or is absent, or cannot be found, the circuit court of the county where the land is registered, on petition, shall make such order as may be according to equity in the premises.⁶¹ The court which entered the decree of registration of the land shall retain jurisdiction in the proceeding to enter orders under this section.⁶² There is no provision under the New York act which covers the correction of errors and mistakes in registration. It is evident, however, from what has been said in the preceding paragraphs on the subject of error, that in this country any error made by the registrar, a ministerial officer, may be corrected by a proceeding under the Torrens act, or under the general law. Courts of general jurisdiction have full power to correct errors and to compel ministerial officers to perform their duties properly.

§ 158. Correction of Errors in Foreign Countries. We have seen that under the foreign acts there is a distinction between errors of law, which are mistakes of title, and errors of fact, made by a registrar in the performance of his prescribed duties, and this distinction must be kept distinctly in view. An error committed by a registrar in bringing an invalid title under the act and registering it as good and valid, and an error in construing the legal effect of an instrument of transfer made by the last registered owner, and in registering it accordingly, are errors of law, mistakes of title, which courts can correct only when a right of appeal from his decision is given by the statute. But in exercising any other function in or about registration,—as in entering the name of the person registered, or in describing the land in the certificate or in omitting

⁶¹ § 93 Illinois act. § 92 Oregon act.

⁶² § 93 Illinois act, as amended in 1907.

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to make a memorial of a mortgage or lien, or in issuing a duplicate certificate, etc., he acts in a purely ministerial capacity, and between the parties to the registration, but not to the prejudice of any interest of a bona fide transferee for value, such errors may be corrected, either by the registrar himself in suitable cases and under certain restrictions, or by the court in a proceeding under the act for the rectification of the register, or in a proceeding under the general law to compel the registrar to do his duty properly. A registrar may correct errors on the register when an obvious mistake has been made, and no rights of third persons have intervened. He may, upon such evidence as appears to him sufficient, correct errors in certificates of title, or in the register, or in the entries made in them, and may supply entries omitted to be made under the provisions of the act, provided always that in the correction of any such errors he shall not erase or render illegible the original words, and shall affix the date of such correction or entry, and shall affix his initials.⁶³ The registrar's power to amend certificates is not confined to obvious blunders or mistakes due to his officers, but extends to mistakes induced by acts of persons dealing with the land. He is a judicial officer and has wide jurisdiction in rectifying certificates of title.⁶⁴ If it appears to the satisfaction of the registrar that any certificate of title or other instrument has been issued in error, or contains any misdescription of land or boundaries, or that any entry or endorsement has been made in error, or that any endorsement or entry has been made wrongfully or fraudulently obtained, he may require such certificate to be delivered up for correction; and in case of a refusal to deliver up such certificate or instrument, he may refer the matter to the court.⁶⁵ He has no power to determine controverted questions of fact concerning errors, and he must refer such questions to the court to be passed on and adjudicated. He

63 § 11 Tasmania act. § 11 Queensland act. § 12 New South Wales act. §§ 194, 195 Victorian act. §§ 188, 189 Western Australia act. § 220 South Australia act. §§ 296, 341 English rules, 1908. § 34 Act for Ireland, 1891. § 108 Fiji Ordinance, 1876. § 49 Manitoba

act. § 144 British Columbia act. § 114 Alberta act. § 160 Saskatchewan act.

64 National Company v. Hassett, 1907, V. L. R. 404; 28 A. L. J. 232.

65 §§ 69, 70 New Zealand act. §§ 136-139 New South Wales act. § 136 Tasmania act.

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may have all interested persons summoned into court for the correction of errors in much the same way as is provided for in this country.⁶⁶

⁶⁶ §§ 136, 137 Tasmania act. §§ 70, 71 New Zealand act. §§ 82, 83 Victoria act. §§ 76, 77 Western Australia act. §§ 130, 132 Queensland act. §§ 136, 139 New South

Wales act. §§ 60, 62 South Australia act. § 95 English act, 1875. § 7 English act, 1897. § 119 Ontario act.

CHAPTER XIII.

Concerning Torrens Systems.

§ 159. **Different Torrens Systems.** In a general way it may be said that there are four Torrens systems—the Australian, Canadian, English and American. Such a distinction is founded merely on geographic lines, and is used because it is often convenient and useful. The acts of the six states of the Commonwealth of Australia, the act of the independent state of New Zealand, and the Fiji Ordinance, 1876, are similar in their main purpose or registering indefeasible titles only, and in many of their principal provisions. They have been compiled and treated of in the same volumes, and their points of similarity and difference have been referred to and discussed in the judicial decisions of the several jurisdictions. It is convenient to speak of them as the Australian Torrens system, though they do not differ in any radical way from the acts of Manitoba, Alberta, Saskatchewan or the Northwest territory of Canada, which are founded on the Australian methods and principles of registration. The act for Ireland, 1891, greatly resembles the Australian acts. The Ontario act adopts the principles and phraseology of the English acts, though it differs from them in minor details. Both jurisdictions provide for registering absolute, qualified and possessory titles, and in this they are followed by Nova Scotia and Hawaii, and, in a modified way by British Columbia which registers titles as absolute or as indefeasible. The American acts, except in Hawaii, provide for registering indefeasible titles only, and under all American acts original registration must be made by a decree of court, instead of by an officer clothed with power to perform that function. Thus it will be seen that it is possible to con-

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vey a distinction by the use of the terms, Australian Torrens system, English Torrens system, and American Torrens system. With regard to the effect of registration, there are two distinct schemes. Under the general scheme, registration makes the title indefeasible as against all the world, and under the English scheme, titles are registered as indefeasible or as defeasible,—absolute, qualified or possessory. With regard to the method of original registration, there are two schemes. Registration is made by an officer under one, and it is made by a decree of court under the other. But, so far as the system itself is concerned, these are all subordinate schemes and minor matters, and they do not make different Torrens systems.

§ 160. Variance Between Provisions of Torrens Statutes. There is a certain similarity between all Torrens acts, and yet the provisions of these acts on many subjects are wholly dissimilar or directly at variance. Under some acts, fee simple titles only may be registered, under some, lesser estates and interests are entitled to registration, and under others, lesser estates and interests may be registered when the fee simple has been registered first.¹ Tax titles are discriminated against or favored.² Land subject to a mortgage may be registered only with the consent of the mortgagor in some jurisdictions, and without his consent in others.³ Generally only indefeasible titles may be registered, but titles which are defeasible may be registered also.⁴ Registration is usually made by a registrar, but in some places it may be made only pursuant to a decree of court. Sometimes this court is one of general jurisdiction and again it is one of special jurisdiction.⁵ The registrar is generally an officer with judicial powers under the act, but he is sometimes a ministerial officer only.⁶ He usually passes on instruments and registers them, if satisfied that registration should be made, but he may have no power to register unless all parties agree.⁷ Production of the duplicate certificate is essential to successive registration under some

¹ See ante § 20 et seq.

² See ante § 20.

³ See ante § 107.

⁴ See ante § 13.

⁵ Ante §§ 23, 28, 45.

⁶ Ante §§ 65, 68.

⁷ Ante §§ 65, 71.

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acts, and under others it is not necessary.⁸ The registrar is given power to issue a new certificate on the foreclosure of a mortgage, and a new registration in such case may be made only by order of court.⁹ A person aggrieved by a decision, neglect or refusal to act on the part of a registrar, may apply to court for a review or for directions, but some acts make no such provision.¹⁰ A registrar may correct errors by the terms of some acts, and under others errors may be corrected only by an order of court.¹¹ Generally a duplicate certificate of title is issued only to one who holds the paramount estate, but it is also issued to the holder of a lesser estate or interest and to the holder of a charge.¹² Under most acts statutory forms and instruments must be used in dealing with land, but deeds and other forms of conveyancing in use under the general laws are sufficient under some statutes.¹³ As a general rule, instruments may contain conditions, limitations and restrictions running with the land, and these may be placed on the register, but under some acts this is not permissible.¹⁴ Under most acts no notice of a trust may be registered, but under some acts lands are registered "in trust".¹⁵ Some acts contain provisions with regard to the effect of forgery, but others are silent on that point. Under some acts a forgery is void only as to the first registration under it, and it is also declared to be void for all purposes.¹⁶ A bona fide purchaser for value with notice of unregistered rights and interests is protected in his registration under the same acts, but he is not protected under others.¹⁷ In some jurisdictions he is protected in an error of the registrar in a matter of law and in others he is not.¹⁸ In some places an adverse occupant of land loses his rights when the land is brought under the act, but in others registration is void as to him unless he is notified.¹⁹ It is provided that a will shall take effect from the date of the death of the testator and also that it shall take effect from registration only.²⁰ On the death of a registered owner, land is transmitted to his

⁸ Ante § 80.

⁹ Ante § 114.

¹⁰ Ante § 72.

¹¹ Ante § 158.

¹² Ante § 21.

¹³ Ante § 93.

¹⁴ Ante § 87.

¹⁵ Ante §§ 98, 101.

¹⁶ Ante § 127 et seq.

¹⁷ Ante § 53 et seq.

¹⁸ Ante § 147 et seq.

¹⁹ Ante § 121.

²⁰ Ante § 77.

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heirs, and it is also given to the personal representative as personalty.²¹ Some acts provide for an assurance fund and others do not. Access to the fund is given for loss sustained by the wrongful bringing of land under the act, and such access is confined to losses sustained after original registration.²²

§ 161. Essential Elements of the Torrens System. There are undoubtedly many other subjects on which the Torrens statutes do not agree, but the instances of variances and contrariety just enumerated are sufficient to cause us to inquire what, if any, are the fundamental and essential elements of the Torrens system. While there are many and important statutory provisions concerning registration of titles according to the Torrens system, which regulate administrative matters and supply minor functions, there are only six essential features of the system itself. These essential features are:

1. The creation and recognition of one estate in land,—the registered title—, in lieu of a legal and an equitable estate.

2. The creation of a governmental certificate of title, consisting of a public register and an owner's duplicate certificate, on which the condition of the title is set forth to some certain extent required by the law.

3. Indefeasibility of title to the estate or interest in land, with which the owner is registered, except as to matters declared in the statute, and as to burdens noted on the certificate.

4. The transfer of an interest in land only by entry on the register, in lieu of transfer by the execution of instruments.

5. The creation of liens on land only by notation on the register.

6. The protection of unregisterable rights in land by caveats, cautions or notices of adverse claims.

Another feature is generally considered essential: The creation of an indemnity fund by contributions from registered owners, and the payment from it of compensation for certain losses occasioned by operations under the act. But in this connection the omission of this feature from the Fiji Ordinance, 1876, the English act, 1875, and the California act, can-

²¹ Ante § 125.

²² Post § 193 et seq.

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not be ignored. The doctrine of indefeasibility of a registered title, and the policy of protecting a bona fide purchaser for value from a registered owner, in some cases must divest estates and interests from innocent persons and work hardship in the operations of the system, and the indemnity fund is necessary to round out the system, but it may be carried on without such a fund. The indemnity fund is merely ancillary to the system of registering indefeasible titles.²³

§ 162. A Single Estate in Land. As is well known, there was originally in England only one estate in land, namely, the legal estate. Courts of chancery gradually developed a system of equitable estates in land by enforcing rights against the owner of the legal estate. Many equitable estates thus developed were recognized by acts of parliament, and many were created by such acts. At the present time, under the general laws in countries which have followed the English system of jurisprudence, there are both legal and equitable estates in lands. The Torrens system is an attempt to return to the early English doctrine of one single estate in land, and this estate is called a registered estate.²⁴ If there had been registers of land titles for the past four hundred years, and on these registries all titles had been transferred, just as corporate stock is transferred on the books of corporations, there would be little difficulty in maintaining the policy of having but one estate in land,—the registered estate. There is perhaps nothing in the natures of real estate and personal property, which creates a substantial distinction between modes of transferring and dealing with them. The differences in the modes and methods of dealing with them have arisen from artificial theories and designs for the accomplishment of certain objects, and their legal qualities have been developed in order to accomplish these objects. For four centuries trained minds and a succession of great judges have developed the doctrine of legal and equitable estates and have given them a place in the foundation of the rights of private property in land. Perhaps it would be better today if this work had never been done, but it would seem almost impossible to obliterate by

²³ Post § 183.

²⁴ Hogg, Australian Torrens Sys-

tem, pp. 6, 7 & 780.

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legislative enactment the results of so extended a labor. The complex conditions of modern life and modern jurisprudence make it impossible to return wholly to a system with one estate only. The principles of equitable estates are too well established to be swept aside, and they are too valuable to those who own land to be abandoned by courts in administering the laws of real estate. These facts are taken into consideration in the framing of registration acts under this system, and we find that certain rights and interests in land, quite apart from the registered estate, are recognized and enforced in some manner. Under this system these rights are considered as mere rights and equities, and not as estates in land, and while they are enforced as between the parties to them, the theory of the system is that they must not operate against the indefeasibility of the title of a certificate holder or of a transferee of the land for value and in good faith. These rights and equities give rise to much trouble and perplexity, and the decisions of courts are far from uniform in the treatment of them. This arises partly from the different language of the different acts, but courts have differed greatly in administering the same act.²⁵

§ 163. Concerning the registered estate and equitable rights and interests it has been said: "The erection of one estate—the registered estate,—in place of two, legal and equitable estates, is not, however, allowed to interfere with the creation of trusts and other equitable rights or interests. These no longer constitute 'estates' properly so called, but provision is made for the effectual protection of beneficial rights by entries being made on the certificate of title relating to the estate of the registered proprietor. In effect, what was formerly an equitable estate becomes, for the most part, under the Torrens system, an equitable right rather in the nature of an incumbrance on the estate of the registered proprietor than part of the ownership of the land. It is true that interests in the nature of equitable estates may still be created with respect to land under the system; but these, as will be subsequently pointed out, have not all the characteristics of the true equitable estate of English law. It will be found that this view of regarding trusts and other equitable interests, as in the nature of incumbrances on the registered estate,

²⁵ *Crowley v. Bergtheil*, 1899 A. C. 374. *London S. W. Ry. v. Gomm*, 20 Chan. Div. 562 (1882). *Rogers v. Hosewood*, 2 Ch. 405 (1900).

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removes many difficulties which exist in the practice and theory of the system, and in many cases reconciles conflicting judicial decisions. These difficulties and conflicting decisions have usually arisen from the impossibility of giving the provisions of the statutes an interpretation consistent with the strict preservation of all the rules of the English law of real property.”²⁶

The Torrens system does not aim primarily at the simplification of titles. It is a method of conveyancing and of dealing with land. The logical principle of title registration is that no estates or interests in land may be registered except those which are authorized by statute, and that no estates or interests need be noticed except those which are registered. It will do little practical good to regard an equitable estate as “an equitable right, rather in the nature of an incumbrance on the estate of the registered proprietor than part of the ownership of the land,” and it seems vain to hope that such a distinction will remove “many difficulties which exist in the practice and theory of the system.” In practice an unregistered equitable right in the nature of an incumbrance on land is quite as dangerous and burdensome as an unregistered equitable estate in land. The doctrine of one estate in land will not be relieved of many of its difficulties unless and until the legislative tendency of the people reaches the point where all equitable estates and rights in land are swept away. Unfortunately for the complete development and success of the system, neither the legislative nor the judicial tendency seems to be toward the recognition of the registered estate only in land. § 49 of the English act, 1875, expressly provides for dealing with registered land off the register. This section is a sop to the prejudice of the English against publicity in the matter of titles and in dealing with land, and it is repugnant to the principles of the system of title registration. In deciding some questions of rights in registered land, the courts of British Columbia expressly have denied the doctrine that registration is the operative act to transfer a title and have introduced some of the same doctrines of

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equity, which took away much of the supposed strength and usefulness of the recording acts.²⁷

§ 164. It is sometimes said that Torrens certificates of title to registered land are like certificates of corporate stock. It is true that they have some points of similarity. In its simplest form a certificate of title is a certificate of ownership, just as a corporate stock register is a register of ownership. Neither a purchaser of registered land nor a purchaser of certificates of stock need look back of the last registry of transfer, and a breach of trust, or an ordinary invalidity of title back of that does not affect his title. Under a forged instrument of transfer, according to the general Torrens system, and under a forged assignment of a stock certificate, the person who obtains the first registry has no rights, except as against his transferrer, but any subsequent purchaser without notice is fully protected in his title. But beyond this, few points of similarity may be found, and any claim that the laws governing Torrens certificates of title and certificates of corporate stock are identical arises from enthusiasm and not from accurate knowledge. The law respecting the ownership and transfer of corporate stocks is of modern origin, while the law of real property has come down to us through the centuries, full of history, theories, complications and technicalities. The method of transferring and dealing with registered land is an approach to the method of transferring and dealing with corporate stock, but in order to make the title to land approximate to the title to stock, the laws governing real estate must be made as simple as the laws governing personal property, and the power of the owner of land to contract with respect to it must be as limited as his power to contract with respect to his personal property. Transactions in land must be limited to dealings with absolute ownership; conveyances or transfers must be limited to fee simple titles, or to leases for a term of years; estates for life, and in remainder, and a mortgage and other lien,—in fact all estates or interests in land, except a fee simple and a lease for years,—must be equitable interests only, like a life interest in stock, and not

²⁷ See *Entwisle v. Lenz*, 14 British Col. Reps. 51 (1908). *Westfall v. Stewart*, 13 British Col. Reps. 111 (1907). See § 75, ante.

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legal interests; and it must be possible to create them only by a declaration of trust delivered to a trustee with the certificate of title. If conditions, limitations, restrictions, forfeitures and other beneficial interests may be preserved in dealing with land, manual possession of the certificate of title must be given to the holder of the equitable interest, or to some one for him, on the execution of a suitable deposit agreement. While this plan may be worked out in detail with ingenuity and skill, it will not simplify dealings with land so completely as it may seem to at first impression. Results which are accomplished directly through the present land laws will be worked out indirectly, and new inconveniences and complications will arise in the place of the old ones. When we come to the point, no one wants a system which will restrict registry of land titles to a mere list of owners of land, which will limit transactions in land to transfers of absolute and unconditional ownership, and which will abolish the incidents of the ownership of heritable property. Whenever we may desire such a system, in this country, we may work it out, as to future interests in land, by making the law of real estate the same as the law of personal property. A registry of title is valuable, which will enable intending purchasers of or dealers with registered land to deal with it by a mere entry on the register, without a retrospective examination of the title, and with the simplicity and cheapness of dealing with corporate shares; the only question is whether we are willing to pay the price for it.

§ 165. The Registered Estate. The Registered Proprietor.

It has been said that the Torrens system is an attempt to return to the system of one single estate in land, the registered estate, and to do away with the system of legal and equitable estates. While this is undoubtedly a general object of registration acts, there are phrases in some of the acts, which speak of estates at law and in equity. Thus, in some acts a proprietor or owner is held to mean "any person seized or possessed of any estate or interest in land at law or in equity."²⁸ In other acts a registered proprietor or owner is declared to be

²⁸ See § 3 New South Wales act. land act. § 3 Tasmania act.
§ 3 Queensland act. § 2 New Zea-

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any person appearing by the register to own the interest in land with which he is registered, whether the interest be in possession, remainder, reversion or otherwise, in land or in a lease, mortgage or charge.²⁹ There are several references to legal and equitable estates in different statutes,³⁰ and in some decisions,³¹ but they merely indicate confusion of expression and not an intent to describe an estate in land under the Torrens system.³²

§ 166. Creation of an Indefeasible Title to Land. Under foreign acts, except in certain cases heretofore stated, a certificate confers on the registered owner an unimpeachable and indefeasible title to the estate or interest with which he is registered. It follows from this that where the person registered had no title at all, except for his registration, the certificate divested all estates and interests in the land from other persons, and created the title for him. The creation of a certificate which is conclusive evidence of an indefeasible title is an essential object of the system.³³ In order to attain this object, the state creates an office, confers on such officer the power to pass on questions of title submitted to him in his official capacity, authorizes him to issue a certificate evidencing his decision as to the ownership of land and as to matters which affect the title, and declares his certificate conclusive evidence of the condition of the title as determined by him. In foreign countries there is no limitation on the power of the legislature to make laws, and it is no objection to the scheme, that the object is attained by a statutory declaration of the indefeasibility of a title registered through the exercise of judicial functions by the designated officer. In this country it is held that such an officer is not authorized to exercise judicial functions, that his functions in bringing land under the act are judicial, and that original registra-

²⁹ See § 4 Victorian act. § 4 Western Australia act. § 3 South Australia act.

³⁰ §§ 91, 124 Victorian act. § 5 Tasmania act. § 60 New South Wales act.

³¹ *Staples v. Corby*, 19 N. Z. R. 517, 537 (1900). *Allison v. Petty*,

9 Q. L. J. 125 (1899). *Rowe v. Trustees*, 21 V. L. R. 762 (1895). *In re Bosquet*, 17 S. A. R. 177 (1883).

³² Hogg, *Australian Torrens System*, p. 767 et seq.

³³ *Ante* § 161.

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tion of a title under such a scheme is void.³⁴ The reasoning in the opinion in *People v. Chase*, supra, should be studied most carefully. It seems to apply equally to registrations made by a registrar on original applications and on transfers of registered land. The opinion is long, but it may be embodied here with propriety.

§ 167. The act concerning land titles which was passed in Illinois in 1895, provided that the registrar should bring land under the act by original registration in the same manner as foreign registrars issue original certificates of title. Section 14 provided that upon the filing with the registrar of an application for registration, he should cause examination to be made into the applicant's title to the land, and as to the truth of the matter set forth in the application, and particularly, whether the land was occupied and the nature of the occupation, if occupied, that he should notify all persons apparently interested in the land of the filing of such application, and that he should cause a copy of the notice to be posted on the premises, etc. Section 15 of the act provided that if it should be made to appear to the registrar that the facts stated in the application were true, and that the applicant was the owner of the land, or interested therein as set forth in the application, he should issue a certificate of title and proceed to bring the land under the operation of the act; otherwise he should dismiss the application without prejudice. In considering these and some other provisions of the act, the supreme court of Illinois, in *People v. Chase*, supra, said: "Under these several provisions of the act, if A B claimed to be the owner of a lot in the city of Chicago as devisee, in fee simple, and as such wished to have his title registered as authorized by section 7, his application, in conformity with section 11, would be substantially as follows: 'A B, a resident of Chicago, Cook County, Illinois, unmarried, is the owner of lot——(describing it) in fee simple, not subject to an estate of homestead, unincumbered, subject to no liens or incumbrances; that C D claims to own said lot in fee simple, and his post-office address is No —— street, Chicago, Illinois; that this applicant is of the full age of twenty-one years. (Sworn to)—A B.' Sup-

³⁴ *People v. Chase*, 165 Ill. 527; 52 N. E. Rep. 910; 68 Am. St. Rep. 46 N. E. Rep. 454 (1897). Reaffirmed in *People v. Simon*, 176 Ill. 165; 175; 44 L. R. A. 801 (1898).

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pose the applicant claimed such ownership as devisee under the will of John Doe, deceased. If the will was not recorded in the office of the recorder of deeds (the registrar) it would be the duty of the applicant to furnish a copy thereof, with his application, and any other instruments in his chain of title not then of record in that office. (part of Sec. 14). Under other provisions of that section it would then become the duty of the registrar to cause an examination to be made as to the truth of the facts set forth in the application, and also whether the lot was occupied, and if so, the nature of the occupancy. He would next be required to notify C D, and all other persons whom he might find to be interested, by reason of possession or otherwise, and post a copy of the notice on the premises at least ten days before granting the certificate of registration. If C D, being under no disability, appeared before the registrar in obedience to that notice, and set up claim to the lot as the only heir of John Doe, deceased, claiming that the will accompanying the application was not legally executed as provided by the statute, and that it did not, by a proper construction, devise the lot to A B, or if he was an infant, lunatic or under other disability, and no appearance was made for him by guardian, conservator or next friend, it would be the duty of the registrar, aided by his two examiners, to inquire into the matter, and settle, in the one case, the issue made between the parties, and in the other, ex parte, the claim of ownership set up in the application. If, upon such investigation, he should find the facts stated in the application to be true, 'and that the applicant is the owner of the land in fee simple, as set forth in the application,' he must issue a certificate of title and proceed to bring the lot under the operation of the act, as thereafter provided. But if, upon such examination, he should find that the facts stated in the application are not true, or that A B is not the owner of the lot, it would be his duty to dismiss the application without prejudice, returning the papers to the applicant. If he granted the certificate it would be substantially in the following form: 'State of Illinois, Cook County. A B, of Chicago, Cook County, Illinois, unmarried, is the owner of an estate in fee simple in the following land, to-wit: Lot _____ in the city of Chicago. Witness my hand and official seal, this _____ day of _____, 1896. Seal. Samuel B. Chase, Registrar.' In obedience to the provisions of section 17 of the act, this certificate could only be issued upon the written opinion of two examiners, appointed under section 5, filed with the registrar, 'to the effect that the applicant has a good title to the estate or interest in the land, as stated in the application.' Upon the issuing of the certificate, A B, in the absence of fraud to

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which he is a party, etc., would hold the lot in fee, free from all others, except, first, any subsisting lease, etc.; second, all public highways; third, any subsisting right of way; fourth, any tax or special assessment; fifth, 'such right of action or counter-claim as is allowed by the act;' and sixth, the right of any person in possession of and rightfully entitled to the land, or any part thereof or interest therein, adverse to him at the time when the certificate was issued, as provided by section 29. With the exceptions mentioned in this section, neither C D nor any other person claiming the lot could commence any action at law or in equity for the recovery thereof, or assert any interest, right in or lien or demand upon the same, or make any entry thereon adversely to the title of A B, unless the action should be brought within five years from that date (sec. 37); or, if the right existed at the time of the issuing of the certificate, but no cause of action had then accrued, such party might, prior to the expiration of said five years, file in the registrar's office a notice, under oath, setting forth his interest, etc., and might then bring his action at any time within one year after the right accrued. (Sec. 38.) It is insisted by counsel for appellant, that in such a proceeding before the registrar he would exercise judicial functions, and that the certificate so issued would be, in effect, an adjudication that A B was the owner of the lot in fee simple. It is contended, on the other hand, on behalf of appellee, by the several counsel representing him, that the acts of the registrar and his examiners are only ministerial, and, though performed by the exercise of judgment and discretion somewhat judicial in character, are in no way violative of the foregoing provision of the constitution. Their contention is, that the statute giving effect to the certificate of registration is nothing more or less than a statute of limitations, and it is said: 'Under the act in question the registrar's certificates do not bind any one for the first five years. During that time they may be attacked directly or in a collateral proceeding. The sole object of the first certificate of title is to start the running of the statute of limitations. It is only by virtue of the limitation thus expressed that the certificate ever attains its conclusive effect. The registration of the land and the issuing of the certificate of title start the running of the statute of limitations, and nothing will arrest its operation except the interposition of some adverse claim, which must be made to appear upon the register. Therefore, when the five years have expired and nothing appears upon the register to the contrary, the conclusion is inevitable that nothing can ever be brought forward to disturb the registered title. The advantage of this limitation over our other statutory or common law limitation is, that

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it is based entirely upon matter of record, namely, the registration of the first certificate of title. As it is started by only matter of record, so, if arrested at all, it will be arrested by a matter that will appear upon the same record. Therefore, whether all adverse claims are barred or not can be told by looking at the register.' Conceding all this to be true, it does not, in our opinion, follow that the proceeding before the registrar is not judicial in its character, within the meaning of the constitution, nor that the registrar and examiners upon whose opinion the validity of A B's title is determined, are not clothed with judicial powers. Whether the principal thing to be determined by them be the ownership of the land, or merely whether it shall be brought under the provisions of the act, or only when the statute of limitations shall begin to run, it seems clear that the adjudication is upon the rights of the parties claiming as owners, by construing and applying the law to the facts of the case. The definition of judicial power given by Judge Cooley in his work on Constitutional Limitations, held by this court to be sufficiently accurate for the purposes of the question then before the court, which was in substance the same as that now under consideration, is as follows: 'The power which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the laws.' (Owners of Lands v. People ex rel., 113 Ill. 296.) We do not understand that under this definition, or under any definition of the term 'judicial powers,' it is necessary that the adjudication between the parties shall be conclusive of their rights put in issue; but if the party or officer is clothed with the power of adjudicating upon and protecting the rights or interests of contesting parties, and that adjudication involves the construction and application of the law and affects any of the rights or interests of the parties, though not finally determining the rights, it is still a judicial proceeding or the exercise of judicial functions. The question, therefore, in the supposed case is, not whether the registrar finally determines the ownership of the lot, but whether his decision affects the rights of the parties claiming that ownership. As we understand the argument of counsel for appellee, their position is, that the proceeding before the registrar is not to determine the ownership of the lot, but simply to ascertain whether, under the existing facts, the lot shall be brought under the act, and that the determination of the ownership is merely incidental to the ministerial act of bringing the property into registration, and that the courts are left open to all parties claiming any interest adversely to the holder of the certificate of title. It is nevertheless true, that the rights in the case stated of C D are sub-

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stantially and conclusively affected by the decision that A B is the owner and entitled to have the lot brought under the act in question. It will not be denied that the issuing of the certificate puts in operation the statute of limitations against C D, and that it in effect amounts to a determination that if his rights are not asserted in the courts within five years thereafter (unless within the provisions of section 38) he shall be forever barred. In other words, if it be true that the issue before the registrar is whether the property shall be registered and whether the statute of limitations shall from that time begin to run, the decision of that question involves the determination of the ownership of the property; and if it be conceded that the courts are left open to C D for a period of five years from that date, the decision nevertheless takes away from him the existing right to bring his action without that restriction. The decision against him that the property shall be brought under the provisions of the act is as fatal to his right of ownership as though that question were finally and conclusively settled, except that he still has a limited time in which to have his title settled in a court of law or equity. In case of disability at the time the registrar issues his certificate, the right reserved to bring the action within five years may be of no benefit whatever. Section 37 expressly provides, that 'it shall not be an exception to this rule' (that is, that the requirement that the action must be brought within five years,) 'that the person entitled to bring the action or make the entry is an infant, lunatic or is under any disability, but action may be brought by such person by his next friend or guardian.' Let it be supposed, in the case put, that C D, at the time of registration is a child one year of age, without guardian, and, of course, incapable himself of procuring the appointment of one. The registrar decides, and issues a certificate which starts the running of the statute of limitations against him. As to that fact his decision is conclusive. When the statute has run C D is six years of age, still without guardian and still incapable of procuring the appointment of one,—incapable of knowing or protecting any of his rights,—and yet, by the determination of the registrar that A B was the owner of the lot and entitled to a certificate of registration, his rights are absolutely and forever barred. How did the registrar arrive at the conclusion that A B was the owner of the property? Clearly, by the examination of the facts and by construing and applying the law to those facts, in doing which he adjudicated upon the rights and interests of A B and C D, and decided in favor of A B and against C D in a matter of most vital importance. It seems to us that the reading of this act forces the mind to the con-

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clusion that it confers upon the registrar and his examiners judicial powers for the purpose of determining the rights of adverse parties. If, as is contended, the duties of the registrar are purely ministerial, why should he have been required to call to his assistance 'two or more competent attorneys' to be examiners of title, as his legal advisers? Why, if his duties are merely ministerial, should he be limited in his right to bring the property within the provisions of the act, to cases in which he should have the favorable opinion of at least two of these examiners? Manifestly, the act contemplates that he shall consider and apply the law to the facts presented by the applicant, and, lest he should not be able to do so himself, he is required to call to his aid those learned in the law. In the case supposed, whether the will was legally executed would to a lawyer be a simple question, but in its determination it would be necessary to understand and apply the provisions of the statute; and whether, by a proper construction of the instrument, a devise was legally made to a particular person, every lawyer knows would often become a matter most difficult of solution. We are not unmindful of the well settled rule that there are many cases in which ministerial officers exercise quasi judicial powers or discretions and yet the laws conferring such powers are held to be no violation of the constitutional provision under consideration. These cases are referred to and commented upon in *Owners of Lands v. People ex rel. supra*. But what we have already said sufficiently distinguishes the powers conferred upon the registrar by this act from all such cases. It seems to us that it would be difficult to more clearly and positively confer judicial powers upon a person unqualified, under the constitution, to exercise those powers, than is done by this law. This doubtless, resulted from an attempt to adopt the provisions of a similar law in force in Australia, Canada, England, and perhaps other countries, by which the certificate of title issued becomes conclusive as to the ownership of the property, and in which countries no constitutional or other restriction exists against the legislative grant of such powers upon non-judicial officers. The powers of the registrar are no less judicial under our statute than those in the countries referred to. The only difference is, there this is no valid objection to the validity of the law, while here it is fatal. In *In re, etc., ex parte Bond*, 6 V. L. R. (L.) 458, in construing the transfer of land statute, it is said: 'The intention of the legislature was obviously to impose the duty upon the registrar to prevent instruments being registered which, in law as well as in fact, ought not to be registered in the first instance, and to determine the validity of the instruments, as well as the priority of registration in point of

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time. He has therefore to discharge not merely ministerial, but judicial, duties.' Without further discussion of the question we are of the opinion that this law, for the reasons stated, is obnoxious to the constitution, and therefore void."

§ 168. Under American System New Certificate is Not Conclusive. The registrar exercises functions of the same kind and nature in passing on the validity and effect of an instrument of transfer of registered land, and in passing on the validity and effect of each instrument in the history of a title presented for original registration. These functions are held to be judicial in all foreign acts. The exercise of his functions is absolutely necessary to the issue of a new certificate, since he alone may make a new registration. He adjudicates on the rights of all persons in the land, and the statute declares all certificates issued by him to be conclusive evidence of title. From these facts we should expect the courts in this country to hold that, in making a new registration on a transfer of registered land, the registrar adjudicates on the rights of parties, concludes such rights under the very terms of the statutes, exercises judicial functions, and falls within the prohibition of the constitution. This would seem to be the broad and logical effect of the decision in *People v. Chase*, *supra*. Nevertheless, in a general way, where the constitutionality of the whole acts was challenged, and where no specific function of the registrar was under consideration, the courts have held that where he registers a transfer of registered land from the last registered owner, or where he notes on a certificate a mortgage or lien, his functions are not necessarily judicial, but are ministerial, executive, quasi judicial and discretionary, and incidental to the issue of a new certificate, and to the noting of the mortgage or lien, and that his decision in such matters is not conclusive, but may be litigated in any proper manner.³⁵ When it was decided that, under the statutes in this country, the registrar necessarily did not exercise judicial functions in making a new registration, many per-

³⁵ *People v. Simon*, 176 Ill. 165; 52 N. E. Rep. 910; 68 Am. St. Rep. 175; 44 L. R. A. 801 (1898). *Tyler v. Judges*, 175 Mass. 71; 55 N. E. Rep. 812; 51 L. R. A. 433 (1900). *Robinson v. Kerrigan*, 151 Cal. 40;

90 Pac. Rep. 129 (1907). *State v. Westfall*, 85 Minn. 437; 89 N. W. Rep. 175; 54 Cent. L. J. 282 (1902). *People v. Crissman*, 41 Colo. 450; 92 Pac. Rep. 949 (1907). See § 68, ante, et seq.

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sons jumped to the conclusion that the way was clear to put the Torrens system in operation here. When a ministerial officer acts in a quasi judicial manner, his action is not an adjudication, and is not conclusive on the rights of the parties concerned. At most it may be *prima facie* correct, for there may be a presumption that he performed his duty properly in the premises. It may be set aside in all cases where, in pleading and in evidence, specific acts of fraud, or particular errors and mistakes are shown to have affected it.³⁶ This *prima facie* evidence,—this presumption,—so far as the law of evidence is concerned,—merely means that any person attacking the certificate has the burden of showing that it is wrong, and is a mere rule as to the duty on his part of producing evidence and of persuading the tribunal before which the attack is made. *Prima facie* evidence is binding only until contrary evidence is produced. It determines the finding of fact if no other evidence is introduced, but the moment other evidence is brought forward, the case is to be determined on all the evidence,—*prima facie* evidence and all other evidence,—and the question is whether the weight preponderates in favor of the party having the burden of proof.³⁷ A patent issued by a commissioner of patents is *prima facie* valid, but it may be set aside for lack of patentability, novelty or priority of the invention, as against the original patentee, or against any purchaser and transferee for value. A title founded on a grant from the government, signed by a commissioner of the land office, may be litigated and impeached for error, no matter how many conveyances have been made under it. When a registrar issues a new certificate of title under general orders or rules of a court having supervision over him,³⁸ he obtains the power to make the registration from the terms of the statute, and the general orders or rules of court are a mere guide for him in the exercise of the power. Such orders or rules are not operative against persons who are not before the court on due process, and they

³⁶ *State v. Illinois Central*, 246 Ill. 188; 92 N. E. Rep. 814 (1910).

³⁷ See instruction of the court on a petition to register a title in

Inhabitants of Cohasset v. Moors, 204 Mass. 173; 90 N. E. Rep. 978 (1910).

³⁸ See *Tyler v. Judges*, *supra*.

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do not make a certificate conclusive evidence of title against anyone. Where a registrar submits for the decision of the court any question arising under an act, the opinion so obtained, without hearing persons interested, cannot be looked upon as anything more than a rule to guide the registrar, and will not bind that court or any other in any litigated case, in which the question may be raised by persons actually interested in its determination.³⁹ The statutes declare that a certificate is conclusive evidence of an indefeasible title in all courts and in all places, but a certificate issued on the transfer of registered land must present the adjudication by the registrar on the rights of all interested persons in order to attain this statutory force and effect. In this country a certificate issued on the transfer of registered land presents, not an adjudication by, but merely the discretionary action of, the registrar, which can be only *prima facie* binding on persons interested, notwithstanding the statutory declaration of indefeasibility of title. This declaration is to the Torrens system all that a keystone is to an arch. Without an incontestable certificate, evidencing an indisputable title, a purchaser for value of registered land may not assume that the last registered owner has an indefeasible title to the estate or interest with which he is registered, and there must be a retrospective examination of the title. It is evident that this state of the law is highly unsatisfactory and that, instead of clearing the way for the establishment of the Torrens system of conveyancing on a working basis, it destroys its working capacity. With regard to the nature of the functions of the registrar in this country, the situation seems to be that if they are judicial they may not be exercised under our constitutions, and if they are ministerial and quasi judicial, they never can be the foundation for a conclusive certificate. Since the scheme of operation absolutely requires incontestable certificates, it cannot be worked under our system of jurisprudence. We must wait with patience until the courts show us a way out of this dilemma, remembering that it took more than forty years to settle some fundamental questions of title

³⁹ *In re The Land Transfer act*,
1885, 25 N. Z. L. R. 385 (1905).

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registration under the Australasian acts.⁴⁰

As to the statutory declaration that the bringing of land under the act shall imply an agreement running with the land, that it shall be subject to the terms of the act and all amendments and alterations thereof, it is manifest that only those terms of the act, which are valid and legal, are binding on the land. No invalid phrase or section in the act may be held to be technically a part of it.

§ 169. Effect of General Laws on the Torrens System. It is evident that one great element of difficulty in returning to the system of one estate is the fact that the general laws concerning real estate are still in force in most countries and are administered concurrently with the new laws. The tendency is to apply the old laws and the theories of the old laws, which are better understood, to the evolution and development of the new system. Even though this tendency may be avoided, it is still difficult to determine what general laws relating to land affect and govern land which has been registered under the system. The evils and difficulties arising from the concurrent administration of two different systems of real estate laws are referred to in appropriate places in this work, but a learned writer, who has had an extended experience under the new system in states where general real estate laws are also in force, has treated of them in a much more comprehensive manner. He says: "The complete success of the Torrens system is at present retarded by the fact that it is only 'a' system, and not 'the' system. Until all land in any particular jurisdiction has been brought under the Torrens system, so that no conveyancing transactions can take place in that jurisdiction except subject to the rules of the system, difficulties will continue to crop up. These difficulties are principally due to the undefined nature of the relation between the Torrens Statutes and other legislation, and to the fact that analogies are constantly drawn by the courts from the 'general law' relating to land, which includes the technical rules derived from the feudal system. The tendency of the Torrens system is to throw off these technical rules, and this process would be greatly facilitated if there were no occasion,—as there frequently is at present,—to apply the feudal rules to land which is under the Torrens system. I have

⁴⁰ See ante, § 148.

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endeavored to point out, in the course of the book, what I conceive to be the best way of meeting these difficulties, and possibly the very difficulty of doing this satisfactorily may have its effect in inducing an alteration in the direction suggested, i. e. that the old system of conveyance by assurance should no longer be permitted to exist alongside the Torrens system of registration of title. The way might thus be made clearer for the total abrogation, in theory as well as practice, of the feudal tenure of land in England and territories under the English common law."⁴¹

§ 170. And again he says: "One difficulty in deciding questions relating to rights in land under the Torrens system is the difficulty of determining how much of the general law of the land continues to apply to land under the system. No such question would have to be determined if all the land within the jurisdiction of a legislature were under the system, but until this is an accomplished fact, cases must continue to arise in which the decision will depend on whether a particular proposition of law still holds good with respect to land under the Torrens system. All the existing statutes (except that of New Zealand) agree in purporting to repeal, so far as relates to land under the system, such parts of the general law as are inconsistent with the provisions of the statutes, though in some cases modifications are introduced. These enactments, however, are not of much practical value, or of much help in determining what parts of the general law are inconsistent with the statutes. So far as relates to the general law,—both statute and common law,—as it existed at the date of the system coming into operation in each jurisdiction, questions of the extent of its applicability to land under the system are referred to in their appropriate places. *Prima facie* all such acts of Parliament relating to land include and apply to land under the system; but,—in accordance with the maxim, '*Generalia Specialibus Haud Derogant*,'—the special provisions of the Torrens statutes will take effect so as to exclude the operation of the general statutes whenever such exclusion is essential to the due operation of the special enactments. The real difficulty here, of course, as always, lies in applying the rule; occasionally also it may be difficult to say which is the general, and which the special, statute."⁴² It can hardly be doubted that enactments on the subject of conveyancing procedure, registration, etc., and other matters which are provided for in the Torrens statutes, only apply to land under the system so far as they are not incon-

⁴¹ Hogg, *Australian Torrens System*, preface, p. V111.

⁴² See *Neill v. Lindsay*, 13 S. A. R. 196, 201 (1879).

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sistent with the express provisions of the Torrens statutes.⁴³ Provisions in the general statute which are not inconsistent with the provisions of the Torrens statute, and which can be carried into effect as regards land under the system by adaptation to the procedure prescribed by the Torrens statute, may often be held to apply to land under the system as well as to other land; as where a particular procedure is laid down for obtaining a 'conveyance' of land.⁴⁴ As the area of land under the system increases in any particular jurisdiction, the Torrens statutes necessarily tend to lose their character of 'special' statutes, and there is less difficulty in making the provisions of general statutes apply to land under the system, so far as no express provision of the Torrens statutes is thereby abrogated. There is a growing disposition, however, as the area of land under the system increases, on the part of the legislatures to include in general statutes express references to land under the system, and prescribe the procedure to be adopted where this would necessarily differ from the procedure relating to land under the general law. On the other hand, the difficulty of deciding whether the provisions of a general act do or do not apply to land under the system is sometimes made greater by reason of particular sections of the act expressly excluding such land from their operation, thereby leaving room for a possible inference that other sections do apply to land under the system, though they might not otherwise be thought to do so. There are, however, cases in which not mere matters of form and procedure, but substantial rights, are in question, and where there is an absolute inconsistency between the provisions of the Torrens statute and the general statute. In such cases, whenever the general enactment has been held to override the Torrens statute, the general statute has been either of later date than the Torrens statute, or of later date than a provision re-enacted in the Torrens statute.⁴⁵ Sometimes it is clear from the language of the Torrens statute that the enactment in the general statute has been wholly or partially anticipated, and if the provision made on the subject by the Torrens statute is inconsistent with the provision made by the general statute, the Torrens enactment will usually prevail;

⁴³ See *Sander v. Twigg*, 13 V. L. R. at 774 (1887). In some cases there are express enactments on this point: (New South Wales) Registration Act 1897 (1897 No. 22), s. 6, sub-s. 5; V. 1890, s. 59; (New South Wales) Wills, Probate, and Administration Act 1898 (1898 NO. 13), s. 83.

⁴⁴ *In re Paten* 17 N. S. W. B. 90 (1896).

⁴⁵ See *Neill v. Lindsay*, 13 S. A. R. 196 (1879); *Kirkham v. Julian*, 11 V. L. R. 171 (1885).

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contradictions of this kind are illustrated by the bankruptcy and insolvency legislation.”⁴⁶

The relation of Torrens acts to general subsequent legislation is not only ill-defined, but it is nowhere defined at all. General statutes dealing with land, passed subsequent to a Torrens act, may or may not apply to registered land, and it is impossible to decide whether or not it does, until the supreme court has determined the question. Since one legislature cannot impose limitations on the power of future legislatures to pass laws, it may be that any statutory provision is void, which attempts to declare that registered land shall not be affected by subsequent legislation unless registered land is referred to in apt words.

§ 171. The general policy of the real estate laws of a state should be uniform. If it is considered to be the better policy to abolish the rule that possession of land is evidence of all the rights and estates of the person in possession, it should be abolished entirely. It seems incongruous that the general laws should have one rule on that subject, and that the Torrens laws should establish another rule. In Illinois, in applications to register land, abstracts of title, made by makers of abstracts in the ordinary course of business, are *prima facie* evidence of the instruments and proceedings shown therein,⁴⁷ while in suits at law or in equity under the general laws they are not admissible as evidence of title. In making them *prima facie* evidence only in applications to register land, the legislature does not distinguish between registered and unregistered land, for the land is not registered until the application has been passed on, the decree rendered, and the certificate issued. The distinction is between Torrens applications for registration and other proceedings in court. If abstracts of title are suitable evidence of title in one proceeding, they should be made evidence in all proceedings in court.

§ 172. **Concurrent Administration of Two Sets of Laws.** In connection with the suggestion that, in the concurrent administration of two radically different systems of real estate laws by the same courts, there is a tendency to modify the provis-

⁴⁶ Hogg, *Australian Torrens System*, pp. 80, 81, 82.

⁴⁷ § 18 Illinois act, as amended in 1907.

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ions of one system by the application of the principles of the other, it is worthy of note that in the first case determined in the court of appeal of England, construing the provisions of the English land transfer acts, and discussing the principles of the Torrens system, it was held that, notwithstanding land has become registered land, it may still be dealt with by deeds having the same operation and effect as they would have if the land were unregistered, subject only to the risk of the title being defeated or impaired by the exercise of the statutory power of disposition given to a registered owner, against which the grantee must protect himself by notice on the register; that conveyancing may proceed after registration, just as if the land transfer acts had not been passed; that the owner of the legal title, whether registered or not, may convey such title.⁴⁸ This decision was made in order to protect a person who had advanced the money to pay for certain land, and who would be protected under the general law. He was negligent in obtaining registration of his interest, and clearly had no claim to the indemnity fund. The court found certain sections of the acts, some vague, and some referring to unregistered rights and claims, but not to unregistered estates in land, and so construed them as to maintain his interest in the land. The court undoubtedly administered equity, but not Torrens law. It is submitted that such a holding is subversive of the whole Torrens system, under which registration is the necessary act to transfer or affect a registered title, and under which one must deal with a registered owner in order to obtain any interest in registered land.⁴⁹

§ 173. What General Laws Apply to Registered Land. In the absence of express enactment to the contrary, limitation acts apply to land under the Torrens system.⁵⁰ Where the laws of descent of real property are not set forth in the Torrens act, land will descend according to the general laws.

⁴⁸ *Capital and Counties Bank v. Rhodes*, 1 Chan. 631 (1903).

⁴⁹ It must be observed, however, that in the case last cited the court was construing § 49 of the English act, 1875, and that this section is repugnant to the spirit and object

of the Torrens system.

⁵⁰ *In re Bartlett*, 4 Tas. L. R. 26 (1908). *Belize Estate Co. v. Quilter*, 1897 A. C. 367 P. C. Shirley v. Tapper, 23 N. Z. L. R. 849 (1904).

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Where other remedies are not specially provided, the remedies under the general law will be applied to rights in registered land. It has been held that there is a right to distrain for rent of registered land.⁵¹ The mere fact that a Torrens act does not declare in express words that a registration of title procured by fraud may be set aside as between the parties, does not deprive a court of equity of its general jurisdiction to protect parties from the consequences of fraud.⁵² Courts have jurisdiction of equitable estates, even though the statutes do not expressly so provide, and in many acts there are provisions which treat of equitable estates in such a manner as to suggest that they are made the subject of equity jurisdiction.⁵³ Courts of equity will exercise general jurisdiction in matters of fraud and error, and, giving attention to the special provisions of the Torrens act, will issue such orders and directions to all parties to the proceedings as may seem just and proper under the circumstances. They may order parties to make deeds of conveyance, and if the order is disobeyed, they may cause proper conveyances to be made by a master in chancery or commissioner, in accordance with the practice in equity. They have power to declare instruments and transactions void and ineffectual.⁵⁴ Some acts expressly declare that nothing therein contained shall take away or affect the jurisdiction of any competent court on the ground of actual fraud, or over contracts for the sale or other disposition of land for which a certificate of title has been granted.⁵⁵ *Mandamus*, to compel the registrar to register an instrument or make an entry on the register, lies under the general jurisdiction of courts,⁵⁶ and, by analogy, injunction will lie to restrain the registrar from dealing with registered land.⁵⁷ Acts for the registration of titles give to a registered owner immense power to bar clear equities, where

⁵¹ *Bushnell v. Reid*, 10 S. A. R. 188 (1876).

⁵² *Baart v. Martin*, 99 Minn. 197; 108 N. W. Rep. 945 (1906).

⁵³ See § 51 Queensland act. § 249 South Australia act. § 49 English act, 1875.

⁵⁴ *Hogg*, Australian Torrens System, p. 847.

⁵⁵ § 34 Act for Ireland, 1891. § 4 Saskatchewan act. § 126 Manitoba act. § 139 Alberta act. § 51 Queensland act, 1877. § 117 Fiji Ordinance.

⁵⁶ *Ex parte Clark*, 17 V. L. R. 82 (1891).

⁵⁷ *McEacharn v. Colton*, 1902 A. C. 104.

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no entry of beneficial interests may be made on the face of the register, and this power presents a reason for a court of equity to interfere readily by injunction or otherwise.⁵⁸ Where under the provisions of a statute the onus is thrown upon the registrar to be judicially satisfied as to certain matters before he acts in regard thereto, the court will not interfere.⁵⁹

After the San Francisco fire, an act was passed in California "to provide for the establishment and quieting of title to real property in case of the loss or destruction of public records." It covered the whole subject matter, and was doubtless intended by its framers to stand alone. Among other things, it provided that the judgment in the proceeding "shall be binding and conclusive upon every person who, at the time of the commencement of the action, had or claimed any estate, right, title, or interest in or to said property, or any part thereof, and upon every person claiming under him by title subsequent to the commencement of the action." Nevertheless the court read into the act, as applying to it, a provision of the civil code,⁶⁰ that any person interested in the property, and having had no actual notice of the decree, may come in at any time within a year after its rendition, and by showing that he had not been personally served with process, and stating facts constituting a good defense to the proceeding,—that is, facts sufficient to show that he had a valid interest in the property, may have the decree vacated as to him, and may answer to the merits.⁶¹ This interpolation established a rule of limitation repugnant to the very terms of the act. It is evident that as the Torrens system stands in our jurisprudence today, the neutralizing or modifying force of general legislative enactments must be considered in construing Torrens acts. In British Columbia it has been held that the provisions of a general act concerning the lien of judgments on land override and subordinate a provision of the land registry act which declares that no instru-

⁵⁸ Davis v. Wekey, 3 V. L. R. E.
1 (1871).

⁶⁰ § 473 Code of Civil Procedure.

⁵⁹ Ex parte Gallagher, 8 St. Rep.
(N. S. W.)230 (1908).

⁶¹ Hoffman v. Superior Court, 151
Cal. 386; 90 Pac. Rep. 939 (1907).

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ment shall transfer any interest or estate in land until it is registered.⁶²

§ 174. Alphabetical and Tract Indices. All the acts in this country provide that the registrar shall keep alphabetical indices in which shall be registered in alphabetical order the names of all registered owners and of all other persons interested in or holding mortgages or liens on registered land.⁶³ Under the recording system a list of grantors and grantees is required to be kept, but it will be observed that under the Torrens system only a list of persons interested in registered land must be kept. The purpose of the list is not to disclose the deraignment of titles, but to show the names of persons as they become interested in registered land. Such a list can be kept down to date only by means of a card system, and by adding to the list and taking from the list the proper names each day. Many acts provide that he shall keep tract indices in which shall be entered the lands registered, in numerical order of the sections, townships and ranges, and, in cases of subdivisions, the lots and blocks therein, and the names of the owners, with a reference to the volume and page of the register in which the lands are registered.⁶⁴ These indices are just as necessary under the Torrens system as they are under the recording system, and the necessity for them arise from the same cause. Instruments relating to titles are recorded in a record book, and instruments under the system are registered in the register book, without any regard to the location of the land in the county. When a book is filled, the information contained in it is hidden between its covers, and when these books are numerous the only practical way to find the information in them is by means of a set of tract indices kept down to date. In large com-

⁶² *Entwisle v. Lenz*, 14 British Col. Reps. 51 (1908). See *Westfall v. Stewart*, 13 British Col. Reps. 111 (1907). See ante § 75.

⁶³ § 98 Illinois act. § 97 Oregon act. § 103 California act. § 36 Minnesota act. § 44 Colorado act. § 41 New York act. § 43 Washington act. See § 48 Massachusetts act. § 49 Hawaiian act. § 49 Phil-

ippine act. The three last sections merely provide that the registrar shall make and keep indices under the direction of the court.

⁶⁴ § 97 Illinois act. § 96 Oregon act. § 102 California act. § 36 Minnesota act. § 44 Colorado act. § 43 Washington act. See § 41 New York act.

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munities alphabetical indices become so large that they are practically useless, and tract indices are indispensable. In this respect the system of registering titles and the system of recording instruments are on the same footing.

§ 175. The Accumulation of a Mass of Records. Several acts provide that when a registered owner transfers his land, the duplicate certificate shall be surrendered and cancelled, and the original certificate shall be cancelled, and a new certificate shall be issued to the transferee; and when only a part of the land described in a certificate is transferred, or some estate or interest in the land remains in the transferror, a new certificate shall be issued to him for the part, estate or interest remaining in him.⁶⁵ Operations under this method of registration in succession tend to accumulate a large number of register books. A certain degree of registration is frequently referred to as showing the economy and simplicity of the Torrens system, because by it the seven hundred lots in one subdivision were brought under the act at one time. One certificate of title was issued to the owner for all the lots. Under the above method, whenever he may sell one of the lots, he must make a deed, surrender his certificate, take out a new certificate for his six hundred and ninety-nine remaining lots, and get a new page for them in the register. The transferee will be given a new page in the register for his one lot, and he will get a certificate of title. When the subdivider sells another lot, he must make a deed, surrender his certificate, take out a new certificate for his six hundred and ninety-eight remaining lots, and get a new page in the register. The transferee will be given a new page in the register for his one lot and he will get a certificate of title. If the subdivider sells all the lots, one at a time, and makes registrations according to this method, his transactions in the registrar's office will take up fourteen hundred and one duplicate certificates and pages in the register. Large records which are used for similar purposes contain about six hundred and

⁶⁵ § 52 Colorado act. §§ 48, 49 California act. § 50 Minnesota act. §§ 46, 47 Oregon act. § 51 Washington act. §§ 38, 39 New York act.

§ 50 Queensland act. § 79 New Zealand act. § 45 Tasmania act. § 50 New South Wales act.

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forty pages, so that in the transactions more than two volumes of the register will be used up. The Illinois act originally prescribed the same method of procedure, but by the amendment of 1907 it is provided that when the registered owner of subdivided land transfers one or more of the lots or blocks described in his certificate, the registrar, instead of cancelling such certificate and entering a new certificate to the transferror for the remaining lots or blocks, may enter on the register and on his duplicate certificate a memorial of the transfer and of the cancellation of his certificate as to the lots or blocks transferred; and such process may be repeated so long as there is convenient space on the register for making a memorial of a sale and cancellation.⁶⁶ In the New York act it is provided that "if the property is so described as to permit it, the property transferred may be cancelled on the certificate of the transferror without the issue of a new certificate for the residue."⁶⁷ In Australasia, on the transfer of the land described in a certificate, a new certificate may be issued to the transferee, or an entry of the transfer may be made on the register and on the transferror's duplicate certificate, and this entry takes the place of a new certificate.⁶⁸ When part of the land is transferred, a new certificate may be issued for the part transferred, and the old certificate for the remaining land may be suitably endorsed and retained by the transferror, or a new certificate may be issued for the remaining part.⁶⁹

A registered owner holding one duplicate certificate for several distinct parcels of land may surrender it and take out several certificates for portions thereof; a registered owner holding several duplicate certificates for distinct parcels of

⁶⁶ § 48 Illinois act as amended in 1907. § 46 Oregon act, as amended in 1907. The same provision is contained in § 57 Massachusetts act, in § 58 Hawaiian act and in § 58 Philippine act. See also § 50 Nova Scotia act. § 51 Alberta act. §§ 85, 169 Saskatchewan act. § 73 British Columbia act. § 78 Manitoba act. § 43 Fiji, 1876 Ordinance. § 35 Act for Ireland, 1891.

⁶⁷ § 39 New York act.

⁶⁸ § 17 Queensland act. § 99 South Australia act. § 48 New South Wales act. § 94 Victorian act. § 87 Western Australia act. § 77 New Zealand act. § 12 Tasmania act.

⁶⁹ § 93 Victorian act. § 86 Western Australia act. § 13 Tasmania act. § 79 New Zealand act, 1885. § 4 New Zealand act, 1888. § 43 Fiji Ordinance.

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land may surrender them and take out a single duplicate certificate for all of said parcels, or several certificates for different portions thereof.⁷⁰ Under some acts such an exchange of certificates may be made only under an order of court, on petition for its approval.⁷¹ Some method of exchanging certificates obviously is necessary under a system of registering titles, but it does not tend to lessen the mass of records pertaining to registered lands. In all registrations in succession and in all exchanges of certificates such references must be noted in the register and on certificates as will permit the title to be traced either upward to or downward from the original certificate.

A little reflection will make it clear to anyone that the Torrens system will accumulate register books as rapidly as the recording system accumulates record books, and yet the complaint is often made that the recording system accumulates records. Further reflection will clearly show that under the Torrens system a mass of documents and papers must be stored in the registry office. When an instrument has been recorded in the recorder's office, it is sent or handed to the person whose interest in the land has been disclosed on the record by the recording of it, but all instruments, notices and papers required or permitted to be filed in the registry are retained in the office as a perpetual deposit. They must be numbered consecutively and listed in a book, with a notation of the character of the instrument. Deeds, mortgages, certified copies of orders, judgments and decrees of court and of wills, notices of liens, tax sales and caveats, certificates of levies under executions, and all papers filed in the registry must be preserved and stored away.

§ 176. Lost or Destroyed Certificates. Under the system of title registration, where a certificate is issued to the owner of an estate or interest in land, setting forth the condition

70 § 57 Illinois act. § 56 Oregon act. § 26 California act. § 40 Minnesota act. § 45 New York act. § 39 Washington act. § 122 Alberta act. § 168 Saskatchewan act. § 21 British Columbia act. § 50 Nova Scotia act. § 110 New South Wales act. § 94 Queensland act. § 74

New Zealand act. § 78 South Australia act. § 99 Tasmania act. § 77 Victorian act. § 71 Western Australia act. § 111 Fiji Ordinance. 71 § 40 Colorado act. § 43 Massachusetts act. § 44 Philippine act. § 44 Hawaiian act.

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of the title, it is necessary to provide for the issue of a substituted certificate in case of the loss or destruction of the one issued at the time of the registration. The acts all provide for the issue of such substituted certificates to stand in the place of, and have like effect as, the missing duplicate certificates, but while some of the acts provide that they shall be issued by the registrar of titles on an affidavit or a proper showing,⁷² other acts provide that they shall be issued only under an order of court obtained on petition filed and heard. Some of the acts in this country declare that the production of the duplicate certificate of title at the time of any dealing with registered land shall be conclusive authority from the registered owner to the registrar to register the transaction, and it is perhaps because of this that some acts provide that no substituted certificate may be issued until an order of court has been obtained, directing the issue of it.⁷³ The substituted certificate is an exact copy of the one first issued and lost or destroyed, except that it contains a statement that it is substituted for one lost or destroyed. Care should be exercised to deliver it to the person who is entitled to it, but there seems to be no reason why it may not be issued by the registrar, or why the court should be called on for a mere mechanical detail in the administration of the system.

§ 177. Making a Judgment a Lien. A judgment creditor must ascertain whether any land of his debtor is registered under the system. If he has a description of the lands of the debtor he can obtain this information from the tract index which the law requires the registrar to keep in his office, but if he does not know what land his debtor owns, he must resort to the alphabetical list of owners which is also required to be kept. If his debtor has a common name he may find that several similar names appear on the list of owners, and

72 § 58 Illinois act. § 57 Oregon act. § 55 Manitoba act. § 170 Saskatchewan act. § 123 Alberta act. § 82 British Columbia act. § 92 Nova Scotia act. § 75 Tasmania act. § 111 New South Wales act. § 100 Tasmania act. § 79 South Australia act. § 117 Queensland act. § 81 Victoria act. § 75 West-

ern Australia act. § 112 Fiji Ordinance.

73 § 42 Minnesota act. § 51 Colorado act. § 27 California act. § 50 Washington act. 104 Massachusetts act. § 105 Hawaiian act. § 109 Philippine act. § 46 New York act.

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he must determine by inquiry or otherwise which one of the registered owners, or whether any one of the registered owners, is his judgment debtor. In making this determination he acts at his peril, for if he files the certified copy of his judgment as a memorial on the register of the land of some other person than his debtor, he obtains no lien in this country. If, because of the similarity in names, he should file the copy against the land of a stranger to the suit, he would do just the reverse of what the abstract maker does when he shows on an abstract a judgment against some other person with the same name as the owner of the land. In commenting on the section of the act concerning the lien of judgments, it has been said:⁷⁴ "By this section is also avoided the confusion and annoyance arising from identity or similarity of name of the judgment debtor and the land owner." Whatever this may mean, it certainly cannot be said that there is any less confusion or uncertainty in trying to determine whether an owner of land with an identical or similar name is the judgment debtor than there is in trying to determine whether a judgment debtor is the identical person who is the registered owner of certain land. In the steps which must be taken in order to find land to satisfy the judgment, one system has necessarily no advantage over the other, but everything which the judgment creditor is required to do under the Torrens system, in order to obtain a lien on land, is just so much more than is required of a judgment creditor under the general laws, when a judgment is a general lien.⁷⁵

⁷⁴ Land Registration in Illinois. Sheldon, page 57.

⁷⁵ Concerning judgments. See ante §§ 116, 156, post, 214, 220.

⁷⁶ Much has been written about the Torrens system. It usually has been treated of in a common-place way, but one author has considered it from a sociological standpoint in the following sections. § 2. The Torrens acts aim first at complete extinguishment, once for all, of rights adverse to the record title, whether arising from voidable transactions (fraud, etc.), legal incapacity to transfer (coverture, etc.), incomplete service of

process in rem (partition, etc.), irregularities in judicial transfers (execution sales, etc.), unknown heirs, or any other latent title defect whatsoever. § 8. In extinguishing contravening rights the system of title registration merely brings to a logical climax the present system of registering the documentary evidence of title and the constructive notice resulting therefrom. The expediency, however, of final judgments, in fact of all destruction of rights, because of mere omission to claim them (irrespective of negligence), depends upon the following fluctuating fac-

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tors: First, intelligence and energy in individuals (especially minors and females) who are entitled to such rights; second, intelligence and integrity in the judges to whom are entrusted the delimitation and protection of such rights; third, human criminality in general; and, fourth, chance, in the occurrence of evidence, losses and insanity. Economy of State administration as well as efficient aid to the poorer plaintiffs demand speedy justice but not so insistently as real justice. The rapid changes of modern society obliterate evidence, and without evidence human beings can but leave matters as they find them lest they wrong the innocent; but society was created because of the everlasting necessity of protection for the weak against the strong, to the end that a hundred fragmentary minds and wills might be made into a human salvage equal in social efficiency to ten of the stronger minds; and the lapse of time or the failure of the weak to cry out against the oppressor does not alter one iota the social expediency of such salvage. Thus, cutting off rights, where the result is practically a pardon for the wrongdoer, is simply a confession of social blind haste or social poverty in the lack of some class which can afford to and will devote its lives and property to justice. Overlooking the smallest wrong, slighting the most insignificant right, whether known or undisclosed, always does a certain amount of harm to society in the proportionate crippling of an individual. Just how much harm is done by the extinguishment of individual rights by constructive notice under the documentary registration system, with its utter lack of compensation therefor, the author is unable to say. In so far as the title registration system cuts off even more rights adverse to the record title, it obviously would do more harm, even considering the increased benefits to the innocent purchas-

er of real estate, if no compensation were provided for such losses of those whose property is sold. Here, however, appears the real strength of the Torrens system, i. e., reimbursement of wronged individuals by the State out of a fund collected by the State from those who desire such extinguishment of contravening rights.

§ 9. The State indemnity fund is partially socialistic, i. e., it is half inexpedient because of the possible inefficient or corrupt collection, safe-keeping, and disbursement of the fund and because of the vast machinery necessary with its frequent interference and possible blocking by stupidity or venality of an individual's freedom of title transfer; and half expedient for the reason that by such a method the harm of extinguishing the contravening realty rights would be neutralized. It is true that a sum of money, though fairly determined to be the market value of a given piece of land, is not as desirable, not as valuable an asset for a person unaccustomed to or incapable of the ceaseless vigilance required to guard it against accidental loss, theft, and destruction by fire, flood, or any catastrophe of nature; but the present progressive state of industry and banking, utilizing as they do vast amounts of floating capital as well as fixed capital (land), makes it a simple matter nowadays to turn money into realty and vice versa, and the temporary inconvenience or danger of loss caused by reimbursement for extinguished realty rights by money is a low price to pay for the State's administrative convenience of reimbursement, not to mention the social indirect benefit which even the individual so reimbursed gets from the improvement of title transfer methods and hence of all business through the Torrens system.

§ 10. The ultimate cost of the system is nil, except to the state where it furnishes the owner's indemnity below actual administration cost and makes up the deficit

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from the general State funds (and with honest and efficient assurance administration this is a most unlikely condition). For the owner gets an immediate increase of market value for his realty when freed of all possible contravening rights,

far over the price he pays into the indemnity fund. The demand in real estate is overwhelming for absolutely clear titles. The Torrens System of Realty Titles, by Wm. F. Beers, Jr. (1907).

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CHAPTER XIV.

Removal of Titles from Register; Compulsory Registration.

§ 178. **Removal of Titles From the Register.** None of the acts which have been passed in this country provides for removal of titles from the register, and the Australasian acts are also without any such provision. Lord Westbury's act of 1862 gave the owner of land the right to take his title from the register,¹ and the English land transfer act, 1897, contains the following clause: "The registered proprietor of land not situated in a district where the registration of title is compulsory, may, with the consent of the other persons, if any, for the time being appearing by the register to be interested therein, and on delivering up the land certificate or office copy of the registered lease and certificates of charge, if any, remove the land from the register. After land is removed from the register no further entries shall be made respecting it, and inspection of the register may be made and office copies of the entries therein may be issued, subject to such regulations as may be prescribed."² Concerning the right to remove titles, it has been said: "If the adoption of the system is to be voluntary, there must be complete liberty to remove titles from the register too. No harm could be caused by giving this power, as, if the registration worked well, it would not be acted upon, whilst, if the operation of the act were otherwise, it would be only fair. The want of this power (in the act of 1875) has, in the opinion of every witness who was questioned on the subject by the committee of 1878-1879, exercised a deterrent effect on intending applicants. They have done without such a power in Australia it is true; but consid-

¹ § 34 English act, 1862.

² § 17 English act, 1897.

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ering the deservedly bad name that registration of title has obtained in England, no voluntary system is likely to succeed without its insertion."³ In Ontario, where special circumstances appear, which make it inexpedient that the land should continue under the act, the owner may apply to the master of titles for the withdrawal of the land from the registry. The owner must prove such circumstances and show that all interested persons consent to the withdrawal.⁴ A recent law of Oregon provides that any owner of real property, which has been or hereafter shall be registered, shall have the right and power to withdraw it from the registry system and to restore it to the recording system, by making an application in a prescribed form. Thereupon the registrar shall issue a prescribed certificate, stating that it has been so withdrawn and restored, and the certificate shall be recorded in the recorder's office in the proper county. Such a withdrawal shall not disturb the effect of any proceeding under the registry system, wherein the question of title to the land has been determined.⁵ This act does not provide for the withdrawal and recording of instruments of transfer filed in the registrar's office, and where registered land was transferred and afterward withdrawn, title probably must be deraigned partly through the register. In one of the Australian acts it is provided that "no land once subject to the provisions of this act shall ever be withdrawn therefrom."⁶ Of course, one legislature by its statutes cannot bind future legislatures, and it is competent for the legislature of a state at any time to provide for the removal of land from the register.

§ 179. Compulsory Registration. In Australasia when crown lands are sold, the government requires that the purchaser shall register his title under the Torrens system. This has been the law with respect to crown grants practically ever since the registration acts came into operation. All other lands may remain under the general laws at the option of the owner. In Ireland the adoption of the Torrens system is compulsory only in the case of tenant-purchasers assisted by

³ Registration of Title to Land,
Brickdale, pp. 55, 56

⁴ § 136 Ontario act.

⁵ Oregon Statutes, 1911, p. 473.

⁶ § 8 South Australia act.

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the government under any of the purchase of land acts, but all other landowners may or may not adopt it. In the county of London, England, registration under the Torrens system is compulsory on sale; not on a conveyance of property by way of settlement, or by way of mortgage, or by the personal representative of a deceased person to those beneficially entitled to the land; not on an exchange or partition of the property, but only on a sale of the property, in the popular and commercial sense, for money or money's worth; so that a person does not acquire the legal estate in any freehold land under any conveyance on sale, unless and until he is registered as proprietor of the land.⁷ Concerning this subject it has been said: "The system of compulsory registration of titles has never been extended to any other county in England and Wales. According to reports received in November and December, 1907, from U. S. Consular officials at Bristol, Leeds, Liverpool, Nottingham and Manchester, the sentiment of landowners, banks, building societies and land companies is generally adverse to any further extension of the compulsory area, while voluntary registration has been practically abandoned."⁸ In Ontario registration is compulsory as to crown grants in certain districts specified in the acts,⁹ but is otherwise voluntary. It is compulsory as to all land alienated by the crown subsequent to 1885 in Manitoba, and to 1886 in Alberta and Saskatchewan, and is voluntary as to other lands. In British Columbia registration is compulsory as to all instruments executed or taking effect after June 30, 1905.

§ 180. Compulsory Registration in Illinois. In Illinois an act of the legislature was passed in 1903, with a referendum to the voters of any county which may have adopted the Torrens system, providing that "it shall be the duty of all executors and administrators, appointed after the adoption of this act, and trustees holding title or power of sale under wills admitted to probate after that date, to apply within six months after their appointment, to have registered the titles

⁷ Land Transfer Acts, Brickdale and Sheldon, p. 312. § 20 English act, 1897.

⁸ Henry Pegram, member of the N. Y. State commission to invest-

igate the Torrens System of registering titles, in his paper entitled "Land Title Registration."

⁹ See §§ 169-173 Ontario act.

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to all non-registered estates and interests in land, situated in any county in which this act at the time is in force, which the several decedents they represent might have registered in their lifetime in their own right. Such application shall set forth the names and addresses of the persons entitled to the estate or interest sought to be registered, and any such person not joining in the application shall be made a defendant. The court in its final decree, in addition to what is provided in the subsequent sections of this act, shall determine the several titles and interests of the persons claiming under the decedent, and declare the same, and decree in whom registration shall be made. Land so registered shall be subject to be sold for the debts of the estate of the decedent, as now provided by law. Provided, that the court of probate jurisdiction of the county in which the land is situated, in cases where registration may appear to be a hardship, may, by an order entered of record, excuse such application for registration as to the whole or any part of the land."

It was urged against the adoption of this act by the voters of Cook county that it compelled widows, heirs and trustees under wills to bring lawsuits, inviting claimants to come into court and litigate claims which they were not pressing and which might be barred by the statute of limitations; that it compelled them to pay off stale tax claims which had accrued long before they became seized of the land;¹⁰ that such classes of landowners should not be put to the anxiety and expense of lawsuits; that all titles were not equally capable of being registered, and that such owners should not be compelled to have their titles examined by their lawyers in order to determine whether they were the subject of registration or not; that they should not be compelled to exhibit in a public record, based on a petition, an acknowledgment that their titles were such as to preclude registration, as they should have to do in order to be excused by the court from registering their lands; that the courts of original jurisdiction were already behind with their dockets, and that the adoption of the compulsory act would require more judges, clerks, bailiffs, etc., etc. It was urged also that the Torrens system

¹⁰ Ante, § 52.

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was new and untried in this country, that the sections of the act creating it had never been construed by the courts, and that it had not reached a status of certainty and success, which showed clearly and unmistakably that it should be adopted as our only method of conveyancing and dealing with land in the near future. On the other hand, it was urged that the new system was altogether desirable, and that the adoption of the act by the people would result in bringing all the land in the county under the Torrens system within one generation. On a referendum to the voters of Cook county, the vote stood 241,924 for the adoption of the act and 30,043 against it. The supreme court of the state held that the submission of the act to the people was invalid, because the form prescribed in the act for presenting the question to vote had not been followed, and because the ballot had not been placed on the ticket as prescribed in the act.¹¹ At the November election, 1910, the question of the adoption of the act for compulsory registration was again submitted to the voters of Cook County. There had been no demand on the part of newspapers, civic societies, or members of the public that it be put to vote again at that time, but the board of election commissioners were induced to place it on the ballot. Just before election day one or two references were made to it in the public press, as one of the questions to be voted on. Some 360,448 votes were cast at the general election, and on this question 47,740 votes were in favor of it and 11,059 votes were against it. The probate court of that county grants all applications to be excused from registration, on the ground that the constitutionality of the act should be established before anyone should be compelled to register his title. It will be noted that the act for compulsory registration quoted above provides that the probate court, in cases where registration may appear to be a hardship, by an order entered of record, may "excuse such application for registration." It may be unconstitutional and void thus to leave the question of hardship to the arbitrary and unregulated will of the magistrate, without making the exercise of the power of relief in such cases to depend on proof of

¹¹ *Harvey v. County of Cook*, (1906).
221 Ill. 76; 77 N. E. Rep. 424

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any prescribed facts, giving him power to make one rule in one case and another rule in another case.¹² The provisions of this act seem so mutually connected with and dependent on each other, as conditions, considerations and compensations for each other, as to warrant the belief that the legislature intended them as a whole, and that it would not have passed the act if the proviso had been known to be void. In such a case, if the proviso is void, the whole act falls.¹³

§ 181. Generally Concerning Compulsory Registration. Many years ago it was said: "The first step toward making a registration of titles practicable is to make a clean sweep of our present real property laws."¹⁴ As a permanent condition, two concurrent systems of conveyancing in any community present an intolerable situation, but, when it is said that there should be but one system, it is not meant that there should be no attempt to find a better system than the one we may have. Progress is not made by theorizing merely, and it is proper that experiments should be made in conveyancing and dealing with land, as well as in other things. It is not necessary to sweep away our present laws in order to try some other system. The Torrens system has commended itself to discriminating minds in intelligent and progressive communities, and it should be tried in this country. The test of the value of any system is its adaptability to the conditions under which it must be worked. Conditions in this country differ from those in other countries at least in this, that they have no written constitutions, and that they do not have and never have had a recording system founded on the doctrine of constructive notice, supplemented with contracts of title insurance. Any new system should be put in direct competition with our own system, so as to give every landowner the option to avail himself of its privileges and advantages. It should secure support from the public, not through compulsory leg-

¹² *Cicero Lumber Co. v Cicero*, 176 Ill. 9, 26. *Hubbard v. Hubbard*, 77 Vermont, 73. *City of Plymouth v. Schultheis*, 135 Ind. 339. *Mayor v. Radecke*, 49 Md. 217; 33 Am. Rep. 243. *In re Wo Lee*, 26 Fed. Rep. 471. *Yick Wo v. Hopkins*, 118

U. S. 354. See cases cited in these decisions.

¹³ *Cooley on Constitutional Limitations*, pp. 178-9.

¹⁴ *Torrens, Transfer of Land*, p. 32.

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isolation, but through the greater advantages which it offers.¹⁵ It should be made to stand the test of all constitutional questions which may arise under it in this country, and to demonstrate clearly its superiority to the recording system, before any step is taken toward making it our one and only system of dealing with land. When it has stood these tests, it will be time enough to consider the best method of sweeping away our present laws in order to install it. Up to the present time the decisions of our courts have been confined to questions relating to the original registration of lands under the Torrens system, and nothing has been decided which shows its adaptability to dealing with lands which have been registered under it; and since the whole object of this system is to bring lands under it, so that they may be dealt with as registered lands, it is taking a good deal for granted to insist that it has proved its adaptability to the conditions here. The governmental register of titles is the central object of the Torrens system,—the pivot on which all its operations turn,—and it is at least premature to think of the compulsory adoption of the system, so long as there can be the slightest doubt about the power of a registrar to transfer lands and vest titles by the act of registration. The logic of the case of *People v. Chase*¹⁶ would seem to indicate that, in making a registration from the last registered owner to a new registered owner, the registrar must exercise judicial power,¹⁷ and the case of *Assets Company v. Mere Roihi*,¹⁸ expressly holds that a registrar acts judicially within his limited jurisdiction when he makes a registration in succession as well as when he brings land under a Torrens act, that a certificate may not be impeached for error of law in either case, and that a certificate evidences an indefeasible title for all purposes, even though the holder of it would have no title at all, but for his certificate. While under conditions in foreign countries the Torrens system may be called a great system, it is evident that it is still in process of evolution and development, even in its elementary principles. The effect of a reg-

¹⁵ Gov. Wm. E. Russell, in a (1897).
special message to the legislature

of Massachusetts, Feb. 17, 1891.

¹⁶ 165 Ill. 527; 46 N. E. Rep. 454

¹⁷ Ante, § 167.

¹⁸ 1905, A. C. 177, P. C.

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istration by a registrar and the nature of his powers under the system were the subject of conflicting decisions in the courts of Australasian states, until in 1905, in the case last cited, the Privy Council of England settled the question for all states, colonies and dependencies under English jurisdiction by declaring that a registrar acts judicially in his limited sphere of registering titles, and that his certificate is conclusive evidence of title.

§ 182. Duffy and Eagleson, annotators of the Victorian acts, in 1895 said: "That the system has practically attained its objects is shown by the evident favour with which its guaranteed titles are viewed by purchasers and lenders of money, by its rapid adoption in all the Australasian colonies, by the general use of the simple forms in its schedules, by the progressive increase of the amount of land under the old law, which is being brought under its provisions, by the rare instances of actions against the assurance funds, by the number of subdivisinal sales carried out with scarcely a hitch under its rules, by the fact that instances of fraud are certainly not more numerous in regard to land under the act than in regard to other land, and by the trifling cost of transactions under it as compared with that of those under the general law, even with modern improvements. Under it there are in most cases no doubts as to the prior title of one's vendor, or fears of being able to give a good title to possible purchasers. * * * With reference to what has been said as to the advantages of the Torrens system it must, of course, be remembered that it is young and perhaps on its trial yet. It is in some respects a system of formulary law, and may prove itself open to defects and abuses like those of other formulary systems. And outsiders are likely to have sneers for a system scarcely forty years old, which in Tasmania, for instance, is already spread over seven acts."¹⁹ The English act, 1897, provides for compulsory registration on sale of land, and thousands of titles have been registered with possessory title under compulsory registration, and yet, after several years of criticism of the acts and of possessory registration, a parliamentary commission was appointed in 1908 to consider the whole question of title registration. For more than two years this commission worked with an assiduity and vigor which caused much favorable comment. In Janu-

¹⁹ Transfer of Land Act, 1890, Melbourne, 1895.

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ary, 1911, the commission reported to Parliament, and, among other things, recommended: "The system of registration of title to be amended according to our recommendations; and if after sufficient experience the amended system is found to work satisfactorily in the existing compulsory area, Parliament to be invited to consider the gradual extension of compulsion to the rest of the country."²⁰ The committee quotes with approval a phrase in the report of the royal commission of 1868, that "for an institution to flourish in a free country, it must offer to people the thing that they want," and it says: "The system as it stands is, in our judgment, imperfect, and we cannot recommend the compulsory extension of an imperfect system."²¹ Those who read the legal and real estate periodicals and journals published in England observe that the Torrens system in that country is the subject of continued agitation. Many of the discussions are ably conducted and suggest changes in or substitutes for the present laws. Two quotations from a well-known review will show the general trend of the discussions. "There seems at last to be some hope of an inquiry being held as to the working of the land transfer acts. * * * The main objections which the Law Society urge against the system of registration introduced by the land transfer act, 1897, are, that it adds to the expense of transferring land; that it is too complicated; and that registration with possessory title is a delusion and a snare. The first objection is undoubtedly well founded. * * * The second objection—that it is too complicated—is equally well founded. It is sometimes said that the transfer of land ought to be as simple as the transfer of stock, and although this is only possible up to a certain point, yet it is useful to keep the system of transferring stock before our minds, as an ideal which we should seek to attain. Judged by this ideal the system introduced by the land transfer act, 1897, is not a success," etc.²² These suggestions are answered as follows: "The land registry has failed so far to make the system of registration of title as smooth-working and as popular as it ought to be, principally because practitioners have taken advantage of the provisions of the act of 1875 to insist

²⁰ Recommendation 32, p. 56, Second and Final Report of the Royal Commission on the Land Transfer Acts, 1911.

²¹ Pages 10 and 48 of the above

report.

²² An article by Charles Sweet, in Vol. 24 Law Quarterly Review, p. 26, in which he advocates another reform.

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on registration with possessory title when the act of 1897 has made registration compulsory. This is really the chief cause of nearly all complaints made against the land transfer acts and the land registry. Mr. Sweet, perhaps unwittingly, admits this in effect when he speaks of 'the system of registering possessory titles under the land transfer acts' as having broken down. The essence of any really useful system of registration of title is that the title which passes by a transaction being recorded in a public register should be ipso facto a good title, and should not require extrinsic investigation at the hands of a purchaser. Registration with merely possessory title does not ipso facto enable a purchaser to dispense with investigation of his vendor's title prior to the first registration. It is possessory registration that should be condemned, not the whole system of registration of title as it might be carried out even under the existing land transfer acts. No real trial of the advantages of the acts has yet been made on any adequate scale," etc.²³ The system in this country is only some fourteen years old. Its evolution and development have only begun, and "no real trial of the advantages of the acts has yet been made on any adequate scale." The courts here have already laid down the doctrine that a registration is not conclusive between the parties, but may be challenged by "mandamus, injunction, rescission, cancellation, bills of relief and the like,"²⁴ so that the title which passes by registration in a public record is not ipso facto a good title, and if, following the logic of the case of *People v. Chase*, supra, they shall hold that the registrar has no power to issue a certificate which, though invalid itself, will confer an indefeasible title on a bona fide transferee for value, the whole scheme of the system must fall, as being unsuitable to the conditions under which it must be worked. Surely, this is no time to begin to sweep away our present laws in order to make way for the Torrens system. Any measure is likely to be injured rather than benefitted by overenthusiastic and impatient advocates.

In making registration compulsory in this country another feature must be considered. We register indefeasible titles

²³ An article by James Edward Hogg, Author of Australian Torrens System. Vol. 24 Law Review Quarterly, pp. 290, 291.

²⁴ *People v. Simon*, 176 Ill. 165,

p. 173; 52 N. E. Rep. 910; 68 Am. St. Rep. 175; 44 L. R. A. 801 (1898). *Robinson v. Kerrigan*, 151 Cal. 40; 90 Pac. Rep. 129 (1907).

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only, except in Hawaii, and as many titles are not clear and merchantable, and can be made so only by the expenditure of money in doing equity and in the purchase of outstanding interests, some provision must be made to take care of such cases. It will be difficult to formulate a method of taking care of them, which will not present their defects in a glaring and damaging manner.

CHAPTER XV.

Indemnity Fund.

§ 183. Assurance Fund, Indemnity Fund, Insurance Fund. The special fund, which is created under the Torrens system for the compensation of certain persons for losses sustained by operations under the system, may be called an assurance fund, an indemnity fund or an insurance fund. The reason for the creation of such a fund is obvious. The act of registration is the operative act, and the transfer and vesting of the title is effected, not by the execution of an instrument of transfer, not by the act of the owner of the land, not by the transfer of a valid title from the transferror, but by the state acting through its officer, the registrar; and because it transfers and vests the title by the issue of a certificate which is declared by statute to be conclusive evidence of an indefeasible title to land, the state creates a fund for the compensation of such persons as may be injured by the divesting and cutting off of rights, interests and estates under this statutory declaration. The purpose of registration acts is two-fold, to give certainty to the title to estates in land by registering the title after it has been examined into and established by proofs which are deemed to be requisite by the registrar, and also to facilitate the proof of titles and the transfer thereof by issuing to the owner a certificate which is conclusive evidence of the ownership and character of the title as registered, except in certain specified cases. No action for possession or other action for the recovery of the land will lie against the registered owner, except in these specified cases, and, except in these cases, the production of a certificate of title is an absolute bar to any such action, any rule of law or equity to the contrary notwithstanding.¹ The legislatures foresaw that in some instances

¹ Ex parte Metropolitan Bldg., Attorney-General v. Goldsbrough, Society, 10 V. L. R. L. 361 (1884). 15 V. L. R. 638 (1889).

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the creation of an indefeasible title in the registered owner might occasion hardship, for, despite every precaution, mistakes may be made in vesting such a title, and, as ancillary to this scheme, they provided that in certain cases, as fraud, error and misdescription, a right of action should accrue to injured persons against persons causing the injury, and that an indemnity fund should be created, out of which in certain cases compensation should be made to those who might suffer loss by the divesting of estates and interests under the operations of the acts.² In a broad and general statement of the scheme of indemnity under the system, it is sometimes said that any person sustaining a loss in dealing with registered land is entitled to compensation from the fund. Perhaps this is a general theory of what such a system might be in its perfection, but no legislative act establishing the system has ever declared for so general a principle of compensation for losses, and each act specifically defines the classes of persons who may have access to the fund. In practical working under the terms of different acts, it has been found that a person may be the victim of a forgery, fail to get the title which he supposed he was purchasing, and have no right to compensation from the fund.³ No system of conveyancing and of dealing with land is perfect in the sense that losses may not occur to those who use it. It must be remembered that the recording system has its scheme of public records and its doctrine of constructive notice of the contents of those records, and that losses sometimes are sustained under it by those who deal with land. It is manifestly the proper function of a Torrens act to provide for access to the indemnity fund, in certain cases only, even though some case may arise which is not provided for. The general scheme of indemnity is that any person deprived of any interest in land through the bringing of it under the system, or by the registration of any other person as owner, or any person sustaining loss through any mistake, omission or misfeasance of the officers or assistants in the registry, or by any error in any certificate, or in any entry or memorial on the register,

² *Hassett v. Bank*, 7 V. L. R. L. 380; 3 A. T. L. 38 (1881). ³ Ante § 129.

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and who is barred from bringing any action for the recovery of his interest in the land, may obtain compensation from the fund, according to the terms and provisions of the acts.

§ 184. It is often said that the Torrens system is a scheme of guaranty of title, with an indemnity fund to make good the guaranty of the state. Some years ago it was said: "Guaranteed title is the proper name for the system now in use in Australia, and which we want,—a system, namely, which confers on a bona fide registered owner, either a right to the land, or a proper compensation for his loss if he cannot be given the land. We must look upon our register of titles as essentially a list of guarantees; it is also a list of estates and rights in land, but this is secondary; the attempt to work it on any other principle must end in confusion."⁴ But such nomenclature tends to confuse us in this country. Under our system of title insurance or guaranty of title, the holder of the guaranteed certificate of title or policy of title insurance is paid when it is determined that he is not seized of some interest or estate in land, with respect to which he was guaranteed or insured. But under the Torrens system the holder of a certificate, which is not the subject of some exception, needs no guaranty or insurance, because it is declared by statute to be conclusive evidence of title. The holder of a certificate which falls within one of the exceptions is a certificate holder in a sense, but he is not the holder of a certificate which is conclusive evidence of an indefeasible title. He may recover compensation from the fund, in case he is deprived of land through a misdescription, or because of the existence of a prior certificate for the same land, except where the same land may have been included in two or more grants from the Crown, where it is proved that the person liable for compensation and damages for having caused the loss through his mistake, is dead, is insolvent or has absconded. Where one person is erroneously registered as owner of registered land in place of another, the latter is entitled to compensation from the fund in case he cannot recover damages from the person who caused the loss. The guaranty of

⁴ Registration of Title to Land, Charles F. Brickdale, 1886. See also Transfer of Land Act, Duffy & Eagleson, p. 8, (1895).

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title, therefore, under the Torrens system is restricted to holders of certificates which are not conclusive for some reason, and to persons who have been deprived of some interest by the issue of a certificate, and it has nothing to do with a valid last certificate of title. In its general scheme the system is not so much one of guaranteed title as it is one of indemnity for interests and estates in land, which, through the acts of the registrar, have been taken from some persons in order to vest indefeasible titles in the holders of certificates.⁵ A certificate of an indefeasible title confers on the holder an absolute right to the land against all the world, but a guaranteed title does not protect the holder of the guaranty from attack; it merely entitles him to compensation in case of disturbance or ouster.

§ 185. Generally speaking, the person entitled to indemnity is not a certificate holder, but is some person who has been deprived of some interest or estate in land by the issue to another person of a certificate which vested such interest or estate in the holder. This scheme of indemnity will work only in states where, in making a registration which the statutes declare to be conclusive evidence of title, the registrar adjudicates on the rights of all interested persons, and where, as a necessary consequence, rights and estates in land are wrested by force of the statutes from one person, in order to vest them in the person registered as owner. It is at least doubtful whether such a scheme will work under our laws. If a person is deprived of land by a decree of registration, under which land is brought under the act, he sustains a loss for which there is no legal remedy; and it is difficult to see how a certificate of title to registered land issued by a registrar in this country may take away any interest or estate in land belonging to a person, and thus give him a right of action against the fund for damages. It is generally considered that there are seven essential features of the Torrens system, and that the indemnity fund is one of them.⁶ Nevertheless, the Fiji Ordinance of 1876 and the California act, 1897, make no provision for the creation of such a fund, and the British Columbia act, 1906, provides that the assurance fund shall apply only to lands registered

⁵ Ante § 73.

⁶ Ante § 161.

in the register of indefeasible fees, and not to those registered in the register of absolute fees.⁷ The English act, 1875, commonly known as Lord Cairn's act, did not provide for an indemnity fund.

§ 186. The Scheme of Indemnity in this Country. In this country the scheme of indemnity under the Torrens system has been vigorously attacked as unconstitutional and void. It might have been considered in each of the cases which passed on the constitutionality of a Torrens act in this country, but most of the courts passed over the indemnity feature of the acts without mentioning it. The supreme court of Illinois merely said: "In our view of the case, the indemnity fund feature of the law need not be considered. The law can, as we think, stand and accomplish its purpose without it." The supreme court of Ohio came to the conclusion that it was unconstitutional, and said:⁸ "The provisions of the act with respect to an assurance fund attract attention. * * * Those for whose indemnity this fund is raised are described in section 146: 'Any person deprived of land or of any estates or interest therein in consequence of fraud, or misrepresentation in bringing such land under the operation of this act, having had no notice of the proceedings, or by the registration of any other person as owner of such lands, estate or interest, or in consequence of any error, omission, mistake or misdescription in any certificate of title, or in any entry or memorandum in the register of titles, or by being omitted in proof of heirship or certificate thereof as provided in section ninety-eight of this act may,' resort to the fund within the time and in the manner specified. It is not likely that the legislature has thought itself authorized to provide for making whole those who have been defeated in judicial proceedings of an adversary character, involving only private rights, and conducted according to the law of the land. The terms of these sections of the act show that the funds is to be raised to indemnify those whose lands have been wrongfully wrested from them under the earlier provisions of the act, and without due process of law. When the provisions of the constitution are applied to this penitential scheme it at once becomes apparent that it is both inadequate and forbidden."

Quoting from the bill of rights, which ordains that private

7 § 108 British Columbia act. 575; 47 N. E. Rep. 551; 60 Am. St. 8 State v. Guilbert, 56 Ohio St. Rep. 756; 38 L. R. A. 519, (1897).

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property shall ever be held inviolate, and, when taken in time of war, or other public exigency, a compensation therefor shall first be made in money or first secured by a deposit of money, except in certain specified cases, the court holds that the scheme is invalid on the grounds above quoted, and also, for the reason that there is no provision for compensation to be first made, the owner's recourse being to a subsequent action to be instituted by himself, and subject to a limitation, and there being no assured compensation at any time. And again the court said :

“In yet another aspect the scheme is violative of the same section of the bill of rights. Whether the assurance fund would be adequate or inadequate, it is, in part at least, to be derived from forbidden sources. The real estate in the hands of an assignee for the benefit of creditors belongs to the assignor and his creditors. These lands, by the terms of the act, are subjected to a charge or contribution payable through the recorder to the treasurer of the county. That is, to the extent of such assessments, this property is to be taken by public authority and without the consent of the owners. For what public purpose? Primarily the purpose is to indemnify private persons whose lands have been wrongfully taken from them under the provisions of the act. If the act were otherwise constitutional, the ultimate benefit would accrue to those who, as the result of registration which gives conclusive effect to mistake, fraud or forgery, have acquired lands which belong to others. That this is in no sense a public purpose seems clear. Considering the purposes for which government is instituted and the high conception of individual right which prevailed at the time of the adoption of the constitution, it would be strange if authority had been conferred upon the state to carry on the business of an insurer of private titles. No such authority is implied in any of the terms of the constitution. It is not implied in any of the enumerated purposes for which government is formed. It is entirely foreign to those purposes. The legislature may by law authorize the organization of corporations for the purpose of carrying on the business of insurance, but this grant of power is rather an implied negation of its authority to conduct such business itself. The functions of the state are governmental only. Its powers are embraced within the three familiar divisions of legislative, judicial and executive. He who affirms the existence of the power in question must be able to find it embraced in one of these divisions. And since the insuring of titles does not essentially differ from any other insurance, nor indeed from any

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other business or occupation, he must find authority in whose exercise the state may become the competitor of the citizen in every vocation.⁹

§ 187. Creation of Indemnity Fund. In Alberta no contribution to the fund is made at the time of the original registration, but upon any absolute transfer of the land after the issue of the first certificate of title therefor, one-fifth of one per cent of the value of the land must be paid if the value does not exceed \$5,000, and one-tenth of one per cent on the value in excess of \$5,000 must be paid. Upon every subsequent transfer payment must be made of one-fifth of one per cent on any increase in value since the granting of the last certificate, if the increase does not exceed \$5,000, and of one-tenth of one per cent on any increase in value above \$5,000.¹⁰ In British Columbia a schedule of fees is established, and fees must be paid towards the assurance fund as follows: On all registrations up to \$1,000 in value, fifty cents; from \$1,000 to \$2,500, seventy-five cents; from \$2,500 to \$5,000, one dollar; from \$5,000 to \$10,000, one dollar and one-half; from \$10,000 to \$20,000, two dollars, and for every \$10,000, or part thereof, over \$20,000, fifty cents. Twenty per cent of all fees paid under the act is set apart as an assurance fund. When this fund, with the accumulated interest, reaches the sum of \$50,000, nothing more

⁹ In February, 1898, after this decision, the Torrens act was repealed by the legislature of Ohio. This decision has been highly commended and severely criticised. One writer says: "The court here fails to distinguish between the operation of constitutional limitations on the acts of the federal and state legislatures. While the former are compelled to find in the constitution their authority for every attempt at legislation, the latter have an unlimited range save as to its express prohibitions. There is nothing to prevent state legislatures from guaranteeing titles." Note in *Central Law Journal*, Vol. 54 page 294. The court did not decide the case on the ground that the scheme was contrary to the spirit and policy of the constitution of Ohio. It pointed out the

express provisions to which the scheme was repugnant, and clearly indicated the "express prohibitions" which limited the power of legislation. The opinion meets all the requirements of proper judicial and constitutional construction, but there may be easily a difference of opinion as to whether the arguments and considerations of the court are sound. It may be cogently maintained that a state has power to go into the insurance business if it desires to do so. The California act was approved on March 17, 1897, and the *Guilbert* case was not decided until June 22, 1897. It is evident, therefore, that this decision had nothing to do with the omission of the indemnity feature from the California act.

¹⁰ § 117 Alberta act.

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is added, but when this sum is diminished, twenty per cent of the fees is again added until it reaches \$50,000, and so on in perpetuity.¹¹ The English act establishes "an insurance fund to be raised by setting apart at the end of each financial year such portion of the receipts from fees taken in the land registry as the Lord Chancellor and the Treasury shall by order determine."¹² Upon granting an application for amendment of a certificate, or for the exercise by the commissioner of certain powers conferred on him by the acts, the commissioner may grant such application conditioned upon the applicant contributing to the fund such a sum of money as the commissioner shall certify to be in his judgment a sufficient indemnity by reason of the non-production of any document, or inability to obtain consent, or by reason of the imperfect nature of the evidence of title, or as against any uncertain claim which may arise upon the title, or any risk to which the fund may be exposed.¹³

§ 188. Creation of Indemnity Fund, Original Registration.

Generally speaking, the indemnity fund is created by the levy of a small tax or contribution, based on the value of the land, and paid into a special fund for the purpose of indemnity under the act. Such a contribution is usually levied at the time of the original registration. Under the Australian acts the sum of one halfpenny in the pound sterling upon the value of the land brought under the act is levied at the time of the issue of the first certificate.¹⁴ In Manitoba, where the original grantee from the Crown applies for registration and no transaction or instrument affecting the land has been registered except mortgages or leases, one-tenth of one per cent is paid into the fund, and in all other cases one-quarter of one per cent is levied.¹⁵ Any excess above \$75,000 in the fund is transferred to the consolidated revenue. In Saskatchewan, upon the first registration, there must be paid for the assurance fund

11 § 109 British Columbia act.

12 § 21 English act.

13 § 203 Victorian act. § 197 Western Australia act.

14 § 177 New Zealand act. § 201 South Australia act. § 108 Tasmania act. § 197 Victorian act. §

191 Western Australia act. § 119

New South Wales act. §§ 41, 140

Queensland act. This is about twenty cents on each hundred dollars.

15 § 154 Manitoba act.

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one-fifth of one per cent on property worth \$5,000 or less, and one-tenth of one per cent on any excess in value over \$5,000, and on any absolute transfer of the land there must be paid on the increase in value since the last certificate one-fifth of one per cent up to \$5,000, and one-tenth of one per cent on any increase in value over \$5,000.¹⁶ Any excess over \$75,000 in the fund is transferred to the consolidated revenue. In Ontario, on the first registration with an absolute or qualified title, one-quarter of one per cent of the value of the land, apart from the buildings or fixtures thereon, and one-tenth of one per cent of the value of the buildings and fixtures, is paid into the fund; and on the first registration with a possessory title one-eighth of one per cent of the value of the land, apart from the buildings or fixtures thereon, and one-twentieth of one per cent of the value of the buildings and fixtures, is paid into the fund. The payment may not be less than one dollar.¹⁷ In Nova Scotia, on the first registration of land with an absolute or qualified title, one-fourth of one per cent of the value of the land is paid into the fund; and, on the first registration with a possessory title, one-eighth of one per cent of such value is paid. No payment of less than one dollar may be made.¹⁸ In this country one-tenth of one per cent of the value of the land must be paid into the fund on the bringing of it under the act.¹⁹ This value is variously determined on the basis of the last assessment for local taxation, for municipal taxation, and for general taxation. In Illinois and Oregon the value is to be determined by the registrar. In Minnesota the value of the improvements is excluded. In New York a person registering his title may elect to take it "without recourse to the assurance fund," in which case the certificate is plainly marked with those words. But any owner of registered property may pay to the registrar one-tenth of one per cent of its local assessed value, whereupon the registrar shall cancel the words "without recourse to the assurance fund" from the

16 § 163 Saskatchewan act.
 17 § 130 Ontario act.
 18 § 83 Nova Scotia act.
 19 § 99 Illinois act. § 98 Oregon
 act. § 83 Colorado act. § 72 Min-

nesota act. § 82 Washington act. §
 93 Massachusetts act. § 94 Hawaii-
 an act. § 99 Philippine act. "As-
 sessed value of the land" in the
 Massachusetts act means the as-

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certificate, and the owner thereafter may avail himself of any right to recover compensation from the fund, which right may thereafter arise.²⁰

§ 189. Creation of Indemnity Fund, on Transmission, on Registration of Tax Title, on Settlement. In most of the Australian acts, in addition to the contribution at the time of the first registration of the title, the sum of one half penny in the pound sterling on the value of the land must be paid upon the registration of the title to an estate in freehold in possession in land, derived through transmission in consequence of the death of a registered owner, whether by will or intestacy.²¹ Nova Scotia is the only Canadian province which levies a contribution to the fund on transmission of land, and in that province one-eighth of one per cent on the value of the land must be paid into the fund on the registration of any title acquired by will or descent, and no payment of less than one dollar may be made.²² In most of the acts in this country an additional levy of a contribution of one-tenth of one per cent on the value of the land is made on the issue of a new certificate of title to a person who acquires it by devise or descent.²³ A third levy is made under the Illinois and Oregon acts when a tax deed is registered pursuant to an order of court on a sale of registered land for taxes or assessments,²⁴ and a third levy is made under two Australian acts when a title is registered on any instrument making a settlement of land.²⁵

§ 190. How Value of Land is Determined. Under most of the foreign acts the value of the land for the purpose of levying the sum for the fund is ascertained by the oath or affirma-

essed value of the land and buildings. Wachusetts National Bank, Petitioner, Land Court Decisions, (Mass.) pg. 149 (1904).

²⁰ § 58 New York act.

²¹ § 119 New South Wales act. § 191 Western Australia act. § 201 South Australia act. § 108 Tasmania act. §§ 41, 140 Queensland act. No contribution on transmission of land is made in Victoria or New Zealand.

²² § 83 Nova Scotia act.

²³ § 99 Illinois act. § 98 Oregon act. § 83 Colorado act. § 72 Minnesota act. § 82 Washington act. § 93 Massachusetts act. § 94 Hawaiian act. § 99 Philippine act. There is no such levy in the New York act, and California has no fund.

²⁴ § 99 Illinois act. § 98 Oregon act.

²⁵ § 119 New South Wales. § 108 Tasmania act.

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tion of the applicant, or the registrar may require the certificate of a sworn valuator, or he may deem the price paid for the land to be the value thereof. In this country the acts usually provide that the assessed value of the land for the purposes of taxation shall be taken as the basis of computation of the amount of the contribution to the fund.

§ 191. Nature of Losses for Which Fund is Liable. As a general statement, without reference to any particular legislative act, it may be said that the grounds upon which proceedings may be had against the indemnity fund are "deprivation of land" and "sustaining loss" by operations under the system of registration. In most cases there may be little difference between these grounds, which may be worked out into a clear legal distinction. The owner of land is not the only one who may sustain loss by being deprived of land; a mortgagee or person holding some registered right against land may sustain loss by being deprived of land *pro tanto*.²⁶ A statute may be so drawn as to make the fund liable for loss or damage in cases where there has been no deprivation of an interest in land once vested in the person suffering a loss, as in case of misdescription of land, or the issue of two certificates for the same land, and it may provide for compensation from the fund where a person suffers loss or damage through the error or misfeasance of the registrar, by failing to be placed on the register at all. It is competent for the legislature to make the assurance fund liable for money loss as well as for loss of land,²⁷ and for loss of that which one dealing with land might expect to get as the result of operations under the system. The scheme of indemnity should be considered broadly, and no qualification of it should be read into the acts.

§ 192. Action Against Fund Not a Common Law Action. In order to maintain an ordinary common law action, the trustee of an express trust must sue for and on behalf of the beneficiaries, but an action against the indemnity fund is an action under a statute, and not a common law action. Where the

²⁶ *Queensland Trustees v. Registrar*, 5 Q. L. J. 46 (1893). *Tolley v. Byrne*, 28 V. L. R. 95 (1902). *Finucane v. Registrar*, 1 St. Rep.

Q. 75 (1902).

²⁷ Hogg, *Australian Torrens System*, pp. 853, 855. In *re Jackson*, 10 N. Z. L. R. 148 (1890).

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statute vests a cause of action in any person deprived of land or sustaining loss, etc., these words include the beneficiaries of an express trust, who have sustained loss by reason of the failure of the registrar to register the trustee of a rent charge on certain land, whereby they lost the benefit of the rent charge, and the beneficiaries jointly may bring an action against the fund for their own benefit.²⁸

§ 193. Recourse to Indemnity Fund, Original Registration. According to the general trend of the foreign acts, an application for registration is referred by the registrar to an examiner of titles who examines the records, deeds and such documentary evidences of title as are presented to him. If, as the result of his work, the examiner finds the title good and valid in the applicant, he makes a report to the registrar, recommending that the title be registered. This method of determining the condition of the title by examination of the records is not precarious. It is the same method which is used by an attorney in examining a title for a client, and it is the same method which is used by title insurance companies in determining the condition of a title for the purposes of title insurance. The conduct of a proceeding in court for registration of a title under the acts in this country is founded on the condition of the title as disclosed by an examination of the abstract of title to the property, and the efficacy of the proceeding depends in part on the correctness and thoroughness of such examination. Under foreign acts, when the registrar registers and certifies the title according to the opinion and report of the examiner, he vests it in the applicant by governmental authority, under the statutory declaration of indefeasibility, and the certification bars all unregistered interests and estates in the land, in favor of the registered owner. But since the indefeasibility of a registered title arises from a general statutory declaration, which is effective even though persons interested in the land had no notice of the application, and since the registration does not have the sanctity of a judgment or decree of court, which binds only those who are properly notified, it is in harmony with a sense of propriety

²⁸ Papworth v. Williams, 20 N. S. W. L. R. 280 (1899). See Daly v. Papworth, 23 Weekly Notes, (N. S. W.) 187 (1906).

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and natural justice that the system requires the creation of an indemnity fund, out of which may be compensated "any person wrongfully deprived of any land, or any interest therein, by the bringing of the same under" any act establishing the system.²⁹ By the words, "who shall sustain damage by the bringing of land under the act," it is intended that every person, who is deprived of any interest in land through the bringing of the same under the act, shall be enabled to bring his action for recovery of damages from the indemnity fund. The scheme of the act is to provide a fund for compensating all persons who are deprived of an interest in land by the operation of the act, and reason and justice require that the words shall be broadly construed, and that no qualification shall be put upon the right so given, which is not imposed by statute in express terms.³⁰

§ 194. Recourse to Indemnity Fund, Original Registration. In this country such a proceeding for bringing land under the system is not consonant with our system of government, and a proceeding in court to establish and register a title is necessary. If this proceeding is not conducted with due process of law against a person interested in the land, the decree in it does not deprive him of his interest; if it is so conducted, he is bound by the finding and decree of the court. In a technical and legal sense it is impossible for any person

²⁹ The case of *Anderson v. Davy*, 1 N. Z. S. C. 302 (1882), illustrates how a person may be deprived of land in Australasia by the bringing of land under the registration acts. The owner of land died intestate. His son, representing himself as the owner, fraudulently brought the land under the provisions of the act. He mortgaged it, and failed to make his payments under the mortgage. The land was thereupon sold under foreclosure. All these transactions were without notice of the fraud. Subsequently, some four years after the death of her husband, the widow of the original owner took out letters of administration and brought suit against the assurance fund for the recovery of the value of the land, and it was held that she was en-

titled to recover. The registration of the land vested the title in the son, and the innocent incumbrancer took the title in satisfaction of his debt. The right of the administratrix to sue for the value of the land arose under the laws of New Zealand.

A. applied for the registration of certain land. His supposed deed from B., under which he claimed title, was a forgery, but he did not know this when he was registered. It was held that his certificate gave him an unimpeachable title as against B. *Coleman v. Riria Puwhanga*, 4 N. Z. S. C. 230 (1886).

³⁰ *Public Trustee v. Registrar General*, 17 N. Z. L. R. 577 (1899). *Main v. Robertson*, 7 A. L. T. 127 (1886).

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to be wrongfully deprived of any interest in land by a decree of court. But in some of the acts in this country "a person wrongfully deprived of land by the bringing of the same under the provisions of this act" is among those who may have compensation from the indemnity fund.³¹ This designation of a person who may be a beneficiary of the fund seems to be meaningless as applied to registration of title under our laws, and it was doubtless copied from foreign acts into some of our statutes without due consideration. In some of the acts in this country provision is made for recourse to the indemnity fund, only in matters arising after the bringing of land under the act, and no compensation is provided for any injury by or through the original decree of registration. Under these acts an action for compensation from the fund may be brought by a person who sustains loss or damage or is deprived of land, or any estate or interest therein, after the original registration, through fraud or in consequence of any error, etc.³² While it is not possible, in any legal sense, for a person to be wrongfully deprived of land by a decree of court, yet a person may be deprived of land in consequence of fraud or misrepresentation in obtaining a decree of court. The Ohio act provided that "any person deprived of land, or of any estate of interest therein, in consequence of fraud or misrepresentation in bringing such land under the operation of this act, having had no notice of the proceedings," might bring an action for the recovery of damages so by him sustained against the tort-feasor and the county treasurer, and ultimately recover from the fund.³³ This provision does not appear in any of the other acts. In this country it would seem to be entirely just and proper to leave all parties to their ordinary legal remedies for injuries arising prior to the first registration of a title, and to reserve the indemnity fund for compensation for losses arising after that time.

§ 195. Recourse to Indemnity Fund, Loss After Original Registration. Generally speaking, the provisions of the Tor-

31 § 101 Illinois act. § 100 Oregon act. § 74 Minnesota act. § 85 Colorado act. § 84 Washington act. § 101 Philippine act.

32 § 59 New York act. § 95 Massachusetts act. § 96 Hawaiian act. 33 §§ 146, 147 Ohio act.

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rens acts, giving access to the indemnity fund for loss or damage on certain conditions to certain persons, are complex and difficult to construe.³⁴ They may be analyzed so as to show that they provide for compensation for persons who have been injured (1) by the bringing of land under the act, (2) by fraud, (3) by the registration of another as the owner, and (4) by error.³⁵

(1). We have already discussed the bringing of land under the act as a cause of loss in foreign jurisdictions and under court proceedings in this country.

(2). Fraud is a cause of loss, enumerated in almost all the acts, for which compensation may be made on certain conditions and in certain cases. In every case in which fraud occurs upon a transfer for value, the person who is guilty of the fraud, whether or not he be the one who acquired the title through the fraud, is primarily liable to an action for the loss sustained. When damages cannot be recovered from the person who caused the loss, on account of death, insolvency, absence from the jurisdiction, etc., recourse may be had against the fund.³⁶ Under one act the loss occasioned by fraud is recoverable directly from the fund, but the amount paid from the fund is a debt due to the Crown from the person who caused the loss.³⁷ In the original act in Illinois fraud was mentioned as one of the causes of loss for which compensation could be made from the indemnity fund, but in the amending act of 1907, all mention of fraud was omitted. The Illinois act

³⁴ §§ 126-135 New South Wales act. §§ 126-128 Queensland act. §§ 178-187 New Zealand act. §§ 203-218 South Australia act. §§ 125-133 Tasmania act. §§ 202-217 Victorian act. §§ 196-211 Western Australia act. § 7 English act, 1897. § 132 Ontario act. §§ 96-107 British Columbia act. §§ 148-167 Saskatchewan act. §§ 105-108 Alberta act. §§ 146-151 Manitoba act. §§ 85-91 Nova Scotia act. §§ 101, 102 Illinois act. §§ 100, 101 Oregon act. §§ 74-77 Minnesota act. §§ 85-88 Colorado act. §§ 84-87 Washington act. §§ 58-61 New York act. § 95 Massachusetts act. §§ 101-107 Philippine act. §§ 96-103 Hawaiian act.

³⁵ See § 126 New South Wales act, and other acts.

³⁶ §§ 126, 133 New South Wales act. § 127 Queensland act. § 205 South Australia act. § 127 Tasmania act. §§ 202-207 Victorian act. §§ 196, 201 Western Australia act. § 98 British Columbia act. § 132 Ontario act. § 107 Alberta act. § 146 Manitoba act. § 150 Saskatchewan act. § 86 Nova Scotia act. § 97 Massachusetts act. § 98 Hawaiian act. § 102 Philippine act. § 85 Washington act. § 60 New York act. § 75 Minnesota act. § 86 Colorado act. § 101 Oregon act.

³⁷ § 182 New Zealand act.

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seems to be the only one in which fraud is not named as a cause of loss for which compensation from the fund may be made.³⁸ The first clause of section 101 provides that any person may have a claim on the fund for any loss suffered through any misfeasance of any officer or clerk in the registry office in the performance of his duties, and this expression probably will cover any fraud of such officer or clerk in the line of his duties under the act, but there is no expression in the act broad enough to give access to the fund, in any event or under any conditions, to one who has been injured by the fraud of any person other than such officer or clerk. A person injured by the fraud of another will have a right of action against him under the general laws of the state. The power of a state in this country to create a fund for the compensation of persons who have been defrauded by others in dealing with land is not clear, and the Illinois act may have been amended in this way in order to avoid any constitutional question on this point.

(3). Since provision is made for indemnity for the wrongful bringing of land under the act, it is evident that loss "by the registration of another person as the owner of the land" refers to a registration subsequent to the first. As the registration of another person as owner can take place only through error, whether superinduced by fraud or not, it might seem that this designation of a cause of loss is superfluous. But an examination of the statutes will show that the errors, mistakes and omissions therein referred to in apt words are those made by the registrar or his assistants in the performance of their duties, and there is no provision in exact language that the fund may be liable for errors of those who may deal with the land. The designation under consideration covers such contingencies, and where another person is registered as the owner of the land, the fund is liable to the true owner for the loss, though there was no error, mistake or omission on the part of the registrar or any of his assistants.³⁹ Under the statutes of Australasia, where another person is registered as the

³⁸ §§ 101, 102 Illinois act, as L. R. 134 (1890). Queensland Trustees v. Registrar, 5 Q. L. J. 46 amended in 1907.

³⁹ *Rutu Peehi v. Davy*, 9 N. Z. (1893).

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owner, and the true owner is deprived of his land by the error of a person dealing with the land and not connected with the registry, the person causing the loss is primarily liable for it.⁴⁰ An execution on a judgment was presented to a registrar, and he was directed by the judgment creditor to register it as a memorial on a certificate of title of a person with the same name as the judgment defendant. The land described in this certificate was sold to pay the judgment and was bought in by the judgment creditor, who registered his deed and received a certificate of title for the land. He afterward sold the land to a third person, to whom the real owner gave up possession on the presentation of his certificate. In a suit by the real owner against the judgment creditor, it was held that by the registration of the writ and of the transfer from the sheriff, the title of the real owner was superseded, that he was deprived of his land by the erroneous registration of another as the owner of it, and that he was entitled to recover the value of it from the judgment creditor, notwithstanding the subsequent sale by the latter.⁴¹ A registration obtained by or through a forgery is void; but a bona fide transferee under such a registration takes a good title. In the latter case the true owner loses his land through the registration of another as owner, and is entitled to recover damages from the fund for the value of his land, if he cannot recover from the forger and his accomplices. Where the true owner has been deprived of his land by the registration of another as owner, as the result of the fraud or error of some one not connected with the registry, the state will pay him for it, if he cannot recover damages from the person registered as owner, who thereby deprived him of his property.⁴² F. was registered as sole devisee of land under a will, and the will was subsequently set aside in favor of C., the heir. C. sued F., who had derived benefit by the erroneous issue of the certificate and the sale of the land, and recovered judgment for the value of his land. F. was adjudged insolvent and had no assets. C. thereupon brought an action against the fund for the erroneous issue of a certificate of title by the

⁴⁰ *Hassett v. Bank*, 7 V. L. R. L. 380; 3 A. L. T. 38 (1881).

⁴¹ *Hassett v. Bank*, *supra*.

⁴² See § 151 *ante*.

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registrar to another person, and recovered judgment against the fund for the value of the land.⁴³ By the words, "by the registration of any other person as owner of the land," it is intended that every person who is deprived of his land by the erroneous issue of a certificate of title to another shall be enabled to bring his action against the fund for recovery of damages. The scheme of the system is to provide a fund for compensation of every person who is deprived of his land by the operation of the act, and justice requires that this designation of persons be liberally construed, and that no qualification be put upon the rights so given, which is not imposed by statute in express terms.⁴⁴

So far we have considered from the point of view of foreign acts the provision, that a person sustaining loss by the registration of another as owner of land may have compensation from the indemnity fund. Is such a provision workable under the condition of the law in this country? In order to inflict a legal injury on the true owner and give him a right of action against the fund, the registration of another as the owner must divest the title from him and vest it in the other, to whom it does not really belong. The cases of *Hassett vs. Bank* and *Queensland Trustees vs. Registrar*, *supra*, and a valid new registration under a void registration, are plain and logical as a part of a foreign system, but, in this country under the same facts, it seems to be impossible to follow the same principles and to arrive at the same results. It is quite possible that this cause of loss, the registration of another as owner, for which compensation from the fund is provided in our acts, has been copied into them without due consideration, and that in them it is as inapplicable and meaningless as the phrase, that any person wrongfully deprived of any land through the bringing of the same under the act may bring an action against the fund.

(4). The indemnity fund is liable for loss which may be sustained by any person through any error, omission or misfeasance of anyone connected with the registry office, in the

⁴³ *Queensland Trustees v. Registrar*, 5 Q. L. J. 46 (1893).

⁴⁴ *Public Trustee v. Registrar*

General, 17 N. Z. L. R. 577 (1897).
Main v. Robertson, 7 A. L. T. 127 (1886).

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performance of his duties; and it is liable for a loss sustained through any error, omission or misdescription in any certificate, or in any entry or by any cancellation. The last clause may refer to an error by the the registry office, in which case the fund is primarily liable for the loss; or it may refer to an error of some person dealing with the land, who causes another person to be registered as owner, in which case the person causing the loss is primarily liable, and the fund is only conditionally and ultimately liable for the loss. These provisions are workable under foreign acts, but a doubt must arise about the working of them under our system of jurisprudence. The doctrines of constructive notice of entries on the register and of estoppel must be greatly developed under the Torrens system in this country, before it can be said that errors on the register bind anyone and bar anyone "from bringing any action for the recovery of his interest in the land."

An innocent purchaser for value may rely on the public register, and if entries thereon have been obtained by fraud, or if errors of fact have crept into the record, possibly he may take a good title to the estate as registered therein, not because the register is conclusive evidence of an indefeasible title to the estate as registered, but because there is an estoppel of record against the person who was the victim of the fraud or error.

§ 196. Indemnity Fund in This Country, Comment. The Torrens system is established on the theory that the making of land readily saleable without question as to the validity of the title, and without any necessity for a retrospective examination of it, by making its certificates conclusive evidence of such validity, outweighs in public convenience the possibility of occasional losses of interests and estates in land by operations under the act; and to mitigate the harshness and severity of the system, in making registration under the last registered owner vest indefeasible titles, it provides an indemnity fund, from which compensation in damages may be made to persons sustaining loss thereby.⁴⁵

It may be that in this country a state has power to create such a fund, and that it is only the novelty of the idea, which

⁴⁵ *King v. Price*, 24 N. Z. L. R. v. Registrar, 5 Q. L. J. 46 (1893). 291 (1904). *Queensland Trustees*

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makes it appear to anyone that such a creation is not the exercise of a governmental function. But it is evident that in this country the system has not evolved and developed to a point where we may say that there is a balance of convenience, with conclusive certificates of title, as declared by the statutes, in one scale, and a possibility of a loss of interest in land, with an ancillary indemnity fund, in the other. Leaving out all reference to fraud and error as causes of loss, we may set forth in more ample terms the other two causes, as follows: Any person deprived of any land or of any estate or interest therein, by the first registration thereof under the act, or by the subsequent registration of any other person as owner thereof, through the error of some one not connected with the registry, * * * * and who by the act, that is, by the declaration of conclusiveness of certificates issued under the act, is barred from bringing any action for possession or recovery thereof, may obtain compensation for his loss from the indemnity fund. The intent seems to be that any true owner, deprived of any interest in land through the issue to another of a first or subsequent certificate which ipso facto gives to the registered person the ownership of the registered estate in land, may receive compensation from the fund. On first registration of a title in this country, indefeasibility of title arises, if at all, by reason of the force and effect of a decree of registration, and not by reason of the statutory declaration of conclusiveness of the certificate of title. If the registration of another as owner of registered land bars the true owner, it is not because of the statutory declaration of conclusiveness, but because some one, not connected with the registry, committed a fraud or made a mistake, and an innocent purchaser for value relied on a governmental register and, before the register was corrected, obtained a good title, under the doctrine of estoppel of record. A third person may rely on the record under the recording system, and take a good title, though the title of his grantor was subject to defeat while it remained in him. But these are principles of estoppel and constructive notice under the recording system, and though possibly they may obtain under the Torrens system, they are not contained within the

phrase "and who are barred by this act." There is nothing in any act referring to such principles of law. The cases cited in the preceding section clearly show that the phrase, "by the registration of another as owner," in foreign jurisdictions covers cases in which a certificate would not be conclusive in this country, and that it has a primary and essential meaning in those jurisdictions, which it cannot have here.

It is undoubtedly true that in this country, whether the title is registered or unregistered, an owner may lose his land through fraud or error. But the error which is the primary cause of his loss of registered land must be one of fact, committed either by some one in the registry office, or by some third person dealing with the land, and must not be error of title, error of law, committed by the registry.⁴⁶

When we reflect on the uncertainty of access to the fund in this country, we must conclude that, in omitting the feature of the indemnity fund as ancillary to our scheme of registering titles, the framers of the California act may have been more discerning than at first they seemed to be.

§ 197. Loss after Original Registration, Forgery in England and Ireland. A person who deals with registered land is bound at his peril to see that he deals with the last registered owner. If he is imposed upon and accepts a forged instrument of transfer or mortgage, he is not entitled to recover his loss from the indemnity fund. In the English act, 1897, and in the act for Ireland, 1891, it is provided that the fund shall be liable for a forgery, but there is also a provision in each act that a person shall not be entitled to indemnity for a loss where he has caused or substantially contributed to it by his act, neglect or default. By implication in the act for Ireland, and in express terms in the English act, a forged transfer is absolutely void for all purposes, and a registration may be set aside for forgery, no matter how many subsequent transfers have been made. It would seem to be a proper construction of these provisions, that in case of forgery any person suffering by the rectification of the register will have a right of action against the fund, except the first person registered under the forged instrument. If he committed the forgery he can have no right of action, and

⁴⁶ See § 148 et seq.

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if he was an innocent person, registered as the result of a forgery, he would seem to be barred for having contributed substantially to the loss by his act and neglect in dealing with an imposter.⁴⁷

§ 198. Recourse to Indemnity Fund, Only When One is Barred by the Act. In defining the persons who may become a beneficiary of the indemnity fund, this qualification is made in some of the acts, "and who, by the provisions of this act, is barred and precluded from bringing any action for the recovery of such land, or interest therein or claim thereon."⁴⁸ This clause would seem to limit and qualify all the preceding clauses, for it cannot be said that one has sustained a loss or has been deprived of land so long as he has a right of action to recover his property. It would seem to be axiomatic under the Torrens system that when the estate or interest in land is recoverable, no damages against the indemnity fund are recoverable. A person may be said to have sustained a loss by an error, omission or misfeasance of an officer of the registry only in case the entry on the register is not capable of rectification.⁴⁹ According to the scheme of the Torrens system, a person must be barred and precluded by the provisions of the act from recovering his interest in the land, before he is entitled to resort to the fund. When the new certificate is not conclusive evidence of an indefeasible title in favor of the holder, no recovery from the fund may be had by the true owner, and this principle seems to stand in the way of recovery from the fund in this country in all cases involving the essential elements of the Torrens system.

§ 199. Recourse to Indemnity Fund, Other Remedies Must be Exhausted. In Australasia the statutes give a right of action against any person who procures a registration by fraud, or through his error, and they provide that damages may be recovered from the fund only in case recovery from the person

47 § 7 English act, 1897, sub-sections 2, 3. § 93 Act for Ireland, 1891.

48 § 101 Illinois act. § 100 Oregon act. § 84 Washington act. § 74 Minnesota act. § 85 Colorado act. § 127 New South Wales act. § 178 New Zealand act. § 208 South Australia act. § 128 Tasmania act. §

211 Victorian act. § 205 Western Australia act. § 99 British Columbia act. § 146 Manitoba act. § 108 Alberta act. § 151 Saskatchewan act.

49 § 7 English act, 1897. § 99 British Columbia act. § 108 Alberta act. § 151 Saskatchewan act.

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causing the loss cannot be had on account of death, insolvency or absence from the jurisdiction of the courts.⁵⁰ While all acts do not provide in express terms that a person must exhaust all his remedies before resorting to the fund, this is the obvious implication.⁵¹ This is also the intendment of the Canadian statutes.⁵²

According to the scheme of the Torrens system, the indemnity fund is merely ancillary to the system of registering and transferring titles to real estate. It is intended to relieve innocent persons from the harshness of the doctrine that a certificate is conclusive evidence of an indefeasible title to land, and from any injustice which may arise to them by operations under the act, making for the conclusiveness of a certificate, whether such injustice arises from the fraud or error of some one connected with the registry office, or of some third person dealing with the land. It is not intended to relieve from the legal consequences of his act any third person who perpetrates a fraud or commits an error, and it is not intended to relieve a person, who is injured by operations under the system, from the burden of prosecuting the remedies given to him by the general laws or by the act establishing the system. This is a statement of the general purpose and function of an indemnity fund. Where an act provides for any other remedy for an injury, and also provides for access to the fund for the same injury, the general purpose of the act prevails and, in construing the act, will be taken to imply that the other remedy must be exhausted before access may be had to the fund. The general scheme of the system is that when a certificate may be rectified, or when damages may be recovered from the person who caused the loss, no recovery may be had against the fund. But this is a minor scheme, and in any particular case a statute may give a direct remedy against the fund in the first instance.⁵³ When a person procures a registration through fraud, he is liable for the injury inflicted until the statute of limitations intervenes. But if an applicant applies for registration in good faith and makes

⁵⁰ See ante § 195.

⁵¹ *Fotheringham v. Archer*, 5 W. W. & a'B. V. L. 95 (1868).

⁵² § 96 British Columbia act. §
105 Alberta act. § 146 Manitoba

act. § 148 Saskatchewan act. § 86
Nova Scotia act. § 132 Ontario act,
sub-section 3.

⁵³ § 182 New Zealand act.

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no misrepresentations or misdescription of land, in his application, and, by an error of the registrar, he is registered with a good and valid title, when in fact he had no title, upon a transfer of the land bona fide for value, he ceases to be liable for the payment of any damages which might have been recovered from him by the person with whose title he was registered.⁵⁴ Where a person, without fraud on his part and by an error of the registrar, is registered in succession to the former registered owner with a greater estate or interest than he was entitled to, upon a transfer of such land bona fide for value, he ceases to be liable for the payment of any damages which might have been recovered from him by the person injured by such error.⁵⁵

Under the English act there is no requirement that a person deprived of an interest in land or sustaining loss shall exhaust his other remedies before he may resort to the fund. On the other hand, direct access to the fund is given in case of loss and it is then provided: "Where indemnity is paid for a loss, the registrar, on behalf of the Crown, shall be entitled to recover the amount paid from any person who has caused or substantially contributed to the loss by his act, neglect or default."⁵⁶ Direct access to the fund is given in two Australian acts under certain technical conditions.⁵⁷ The Illinois act, as amended in 1907, gives direct access to the fund for all causes of loss enumerated in the act.⁵⁸

§ 200. It was just said that the indemnity fund is not intended to relieve a third person,—a person not connected with the registry,—from the legal consequences of his fraud or error, and we must now consider the fraud and error of the registrar in connection with the requirement that all remedies must be exhausted before resort may be had to the fund. If a fraud in registration is perpetrated by the registrar or one of his agents, the registrar is liable therefor. The fund is not intended to relieve the registrar in case of fraud on his part, or on the part of his agents. Where direct access to the fund is not given

⁵⁴ § 126 New South Wales act, sub. sect. 4. § 204 South Australia act. § 125 Tasmania act. § 207 Victorian act. § 201 Western Australia act.

⁵⁵ *Idem*, supra.

⁵⁶ § 7, sub-section 6 English act, 1897. See also § 182 New Zealand act.

⁵⁷ §§ 212, 213 Victorian act. §§ 206, 207 Western Australia act.

⁵⁸ § 101 Illinois act.

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in case of fraud, the person sustaining loss by the fraud of the registrar, or one of his assistants, must exhaust his remedy against the registrar personally or on his official bond, before he may resort to the fund. But the situation seems to be different in case of a mere error on the part of the registrar or his assistants. Under the common law and under the general law, a registrar would be liable on his official bond for any error made by him, or any of his agents, in the performance of his duty, whereby loss or damage was sustained by any person dealing with the register. However, all the acts give direct access to the fund in case of loss or damage through any omission, mistake or misfeasance of the registrar, or of any deputy or clerk, in the performance of their respective duties under the acts, and it would seem to be a part of the scheme of the system by the indemnity fund to relieve the registrar from the legal consequences of any honest error made in his office. Some acts provide that no officer or assistant in the registry shall be liable to any action in respect to any act or matter bona fide done or omitted to be done by him in the exercise or supposed exercise of powers vested in him under the acts.⁵⁹ Where there is no express statutory exemption of registry officers from liability on account of errors honestly committed, the giving of a direct remedy against the fund for losses sustained by such errors may be held to exclude any remedy against any person connected with the registry. Under all the acts nearly everything in the administration of the system is left to the satisfaction, discretion and judgment of the registrar, and it is evident that there is no intention that the registrar shall be liable for errors.

§ 201. In order to have access to the fund for a fraudulent deprivation of land or for a loss sustained by fraud, a person need only show that he has exhausted his remedies against the person who caused the loss, and he need not show that he has proceeded against some third person who derived some benefit from the fraudulent transaction.⁶⁰

⁵⁹ § 220 New Zealand act. § 137 Queensland act. § 134 New South Wales act. § 134 Tasmania act. § 24 South Australia act. § 204 Victorian act. § 198 Western Australia

act. § 86 English act, 1875. § 106 Ontario act. § 120 Fiji Ordinance § 90 Act for Ireland, 1891.

⁶⁰ Cox v. Bourne, 8 Q. L. J. 66 (1897).

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§ 202. Recourse to Indemnity Fund, Other Remedies Must be Exhausted, Statutes in this County. In some of the acts in this country it is provided that if a person deprived of any interest in land has a right of action or other remedy for the recovery of such interest, he must exhaust such remedy before resorting to an action against the fund.⁶¹ These acts further provide that an injured person shall have his action in tort against any person who caused the loss, but if he pursues his remedy in tort and also brings an action against the fund, the latter action shall be continued to await the result of the action in tort. Another act provides that if the person deprived of property has any other right of action, or other remedy for recovery on account of such loss or damage, he shall exhaust such remedy before resorting to his action against the fund.⁶² Under most of the acts, the person sustaining loss may join as defendants the person causing the loss and the custodian of the fund, and if he recovers judgment he may recover from the fund only in case no recovery can be had on execution against the person causing the loss.⁶³ The Illinois act gives direct access to the fund in case a loss is sustained by any person dealing with the register, and there is no clause in it which suggests that any other remedies must first be exhausted.⁶⁴

§ 203. Recourse to Indemnity Fund, Contributory Negligence. Under some foreign acts a person who has notice or is aware that an application has been brought to register land, and who does not file a caveat and otherwise protect himself against such registration, has no right of access to the indemnity fund, for any loss he may sustain by such registration.⁶⁵ All the acts provide for the registration of caveats, cautions, and notices of equities in and adverse claims to registered land, for the protection of such rights and interests as may be out-

⁶¹ § 95 Massachusetts act. § 96 Hawaiian act.

⁶² § 59 New York act.

⁶³ § 85 Washington act. § 101 Oregon act. § 86 Colorado act. § 75 Minnesota act. § 102 Philippine act.

⁶⁴ § 101 Illinois act, as amended in 1907.

⁶⁵ § 188 New Zealand act. § 216 South Australia act. § 21 Queensland act. § 217 Victorian act. § 211 Western Australia act. § 130 New South Wales act. § 130 Tasmania act. § 107 British Columbia act. § 132 Ontario act. § 153 Manitoba act. § 7, sub. § 3 English act, 1897.

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standing, but some acts in express language bar access to the indemnity fund where a loss arises from the omission to register them.⁶⁶ In the Australian acts there is no statutory declaration that a person may not recover from the fund for a loss caused or contributed to by his negligence in not protecting his rights in registered land by caveat or otherwise, but the courts have held that the fund is not liable for such a loss. The fund is not liable for a loss occasioned by a mistake of an officer of the registry, if the person suffering the loss, by the exercise of reasonable diligence and caution, could have discovered the mistake and prevented the loss.⁶⁷ To all persons dealing with land, the register is notice of all which would be discovered by a search. A person proposing to deal with registered land should make proper inquiries and searches at the registrar's office, or he must take the consequences of his neglect to do so. He must inquire and find out at his peril whether any instruments affecting the title to the land have been filed for registration, though not yet registered, and he must examine the original mortgages, leases and caveats in order to discover the contents of them and to determine their legal effect. He must bear in mind that the transferrer's interest may be affected by the registration of an instrument between his search and the presentation of his transfer for registration.⁶⁸ The fund is intended to compensate rightful owners and diligent persons who have sustained loss by operations under the act, without their fault, and it seems just and proper to bar a claimant when it is shown that he has not exercised ordinary care and caution in the protection of his rights and interests. The Australasian cases just cited seem to sustain the proposition that the doctrine of contributory negligence is applicable to claims against an indemnity fund, and that if it be shown that a person was negligent in sustaining a loss under the act, he may not recover from the fund, even though there is no declaration in the statute that negligence on his part will defeat his claim. The effect of declaring in the statute that a

⁶⁶ § 7 sub. § 3 English act, 1897.
⁶⁷ § 132 Ontario act.

⁶⁷ *Miller v. Davy*, 7 N. Z. L. R. 515 (1889). *In re Jackson*, 10 N. Z. L. R. 148 (1890). *Oakden v.*

Gibbs, 8 V. L. R. L. 380, 399 (1890). *Mills v. Renwick*, 1 S. R. Eq. (N. S. W.) at 177 (1901).

⁶⁸ *In re Jackson*, 10 N. Z. L. R. 148 (1890).

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claimant against the fund must be without negligence on his part is to put upon him the burden of showing that he was without negligence. When the statute does not say that a claimant must be without negligence, the burden is on the custodian of the fund to show that the claimant was negligent in sustaining the loss. In a general treatise, and without decisions of courts on the subject, it is difficult to state what acts or omissions on the part of a person dealing with the register are to be considered as negligent.

§ 204. Many acts provide that the person sustaining loss must be without negligence on his part in order to obtain indemnity from the fund.⁶⁹ In the English and Ontario acts it is provided that "a person shall not be entitled to indemnity for any loss where he has caused or substantially contributed to the loss by his act, neglect or default."⁷⁰ It may be a question whether the last three words qualify and define the contributory "act," or whether a blameless contributory act will bar him from a recovery. The wording of these sections last cited is very different from the wording of the corresponding sections of the other foreign acts and of the acts in this country. C., the registered proprietor under the English act of a charge on registered land, was supposed to have transferred the charge by assignment for value to O., who thereupon left the assignment at the land registry for registration, and he was accordingly registered as proprietor of the charge. It was afterward discovered that the assignment was a forgery by C's solicitor. There had been no negligence on the part of C., and O. was perfectly honest in the transaction. It was held that O. was not entitled to indemnity from the fund, because, by bringing the assignment of the charge to the registrar, he had affirmed and warranted it to be a genuine document, and by that act on his part, although innocent, he had directly brought about the registration of the charge in his name and so had "caused or contributed to the loss" within the meaning of the above provision of the act.⁷¹ It is not contributory negligence

69 § 59 New York act. § 95 Massachusetts act. § 96 Hawaiian act. 101 Philippine act. § 74 Minnesota act. § 88 Nova Scotia act.

70 § 7 Sub § 3 English act, 1897.

§ 132 Sub § 3 Ontario act. See also § 93 Act for Ireland, 1891.

71 Attorney-General v. Odell, L. R. 2 Chan. Div. 47 (1905).

for a purchaser, mortgagee or lessee to neglect to compare descriptions and plans of land on file in the registrar's office, in order to determine whether the land of the last registered owner is correctly described. Certain land was described in two last certificates of title, and, while it actually belonged to one registered proprietor, it was also registered as belonging to another, from whom A took a lease for a term of years of all the land described in the certificate. He was evicted from the strip of land described in both certificates, and he brought suit against the fund. It was held that, even if A could have discovered from a comparison of the two plats and descriptions that his lessor did not have the title to this strip of land, he was under no duty to search the title of the transferring party or of his transferror, and that he was entitled to recover.⁷²

§ 205. Recovery from Fund, Statutes of Limitation. In most of the acts the period within which an action may be brought against the fund is fixed at six years after the right of action accrues.⁷³ In some acts this period is fixed at ten years,⁷⁴ and in one act it seems to be fixed at twenty years.⁷⁵ Under some acts the time for bringing an action is not extended because of any disability on the part of the person entitled to bring the action,⁷⁶ but under the Australian and Canadian acts a person under the disability of infancy, unsoundness of mind, or absence from the state or province, may bring such action within six years from the date on which such disability ceases.⁷⁷ Some acts provide that an action may be brought within two years after similar disabilities are removed,⁷⁸ and one act provides that it may be brought within five years afterward.⁷⁹ A person deprived of land or sustaining a loss must

⁷² Russell v. Registrar, 26 N. Z. L. R. 1223 (1906).

⁷³ § 102 Massachusetts act. § 103 Hawaiian act. § 107 Philippine act. § 61 New York act. § 87 Washington act. § 88 Colorado act. § 77 Minnesota act. § 130 New South Wales act. § 130 Tasmania act. § 217 Victorian act. § 211 Western Australia act. § 187 New Zealand act. § 127 Queensland act. § 103 British Columbia act. § 153 Saskatchewan act. § 91 Nova Scotia act. § 110 Alberta act. § 132

Ontario act. § 7 sub § 7 English act. § 93 Act for Ireland, 1891.

⁷⁴ § 103 Illinois act. § 102 Oregon act. §§ 150 Manitoba act.

⁷⁵ § 215 South Australia act. ⁷⁶ § 61 New York act. § 102 Massachusetts act. § 103 Hawaiian act.

⁷⁷ See sections of Australian and Canadian acts just cited.

⁷⁸ § 103 Illinois act. § 102 Oregon act. § 77 Minnesota act. § 87 Washington act. § 88 Colorado act. § 107 Philippine act.

⁷⁹ § 150 Manitoba act.

bring an action against the fund within the period of limitation, or be forever barred, even though he has no notice or knowledge, during that period, of the invasion of his rights.⁸⁰ Under the English act, for the purposes of limitation, the cause of action is deemed to arise at the time when the claimant knows, or but for his own default might know, of the existence of his claim.⁸¹ The date of the deprivation of land is the date of the issue of the certificate of title, and the action must be brought within the period of limitation from that time.⁸²

§ 206. Recovery from Fund, Measure of Damages. Where a person has been wrongfully deprived of land by operations under an act, the measure of damages, generally speaking, will be the value of the land at the time of the deprivation.⁸³ But viewed as a matter of insurance, the amount of the indemnity should bear a certain proportion to the contribution paid into the assurance fund and should be limited to the valuation of the property at the time when the amount of such contribution was fixed. Accordingly, some acts provide that a person sustaining loss shall not recover from the fund any greater sum than the fair market value of the real estate at the time of the last payment into such fund on account thereof.⁸⁴ The Ontario act provides that in case of deprivation of mining lands, the compensation to be paid from the fund shall not exceed eight hundred times the amount paid into the fund in respect of the land.⁸⁵ Under some acts the proportion between the compensation to be paid in case of loss and the amount of the contribution to the fund is somewhat crudely adjusted by providing that, on every transfer, the increased value of the property since the date of the last certificate shall be the basis of a new contribution to the fund.⁸⁶

In the absence of any statute on the subject, the general rule for the measure of damages in actions for conversion or deprivation of property undoubtedly obtains in actions against

⁸⁰ *Bonnin v. Andrews*, 12 S. A. L. R. 153 (1878).

⁸¹ § 7 sub § 7 English act, 1897.

⁸² *Rutu Peehi v. Davy*, 9 N. Z. L. R. 134 (1890).

⁸³ It is so provided in § 186 New Zealand act, § 89 Nova Scotia act, § 101 Massachusetts act, § 102

Hawaiian act, § 106 Philippine act and § 61 New York act.

⁸⁴ § 76 Minnesota act. § 87 Colorado act. § 86 Washington act.

⁸⁵ § 133 Ontario act.

⁸⁶ § 163 Saskatchewan act. § 117 Alberta act.

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the fund, and the recovery will be for the value of the interest at the time of the deprivation. Even if it be admitted that the measure of damages against a wrongdoer for fraudulent deprivation of land be the highest value of the land between the date of deprivation and the date of the trial of the cause, or that it may include all expenses of getting the land back from the wrongdoer or of obtaining judgment for damages against him, the right against the fund is not co-extensive with the right against a wrongdoer, and the recovery against the fund cannot exceed the value of the land at the time of the deprivation.⁸⁷ From what has just been said it is evident that the statute must be consulted in order to determine whether the value of the improvements made before deprivation or notice thereof may be included in any claim against the fund,⁸⁸ but it is clear that the value of buildings and other improvements, erected or made subsequent to deprivation and with notice thereof, should be excluded.⁸⁹ Where title to part of the land is taken away, the measure of damages is the difference between the value of the whole land prior to eviction and that of the portion remaining in the transferee after eviction.⁹⁰ Plaintiff is not entitled to recover from the fund loss of profits in business due to the stoppage of the business, and he is not entitled to the repayment of damages and costs with which he was mulct in an action for trespass.⁹¹

Where a person sustains a loss in respect of a mortgage or other lien, the amount of money actually lost will be the measure of his damages, and if the loss sustained arises because of the existence of a mortgage or lien on the land, which was not noted on the register, the recovery may be for the amount necessary to redeem from the mortgage or lien.⁹²

⁸⁷ Cox v. Bourne, 8 Q. L. J. 66 (1897). Russell v. Registrar, 26 N. Z. L. R. 1223 (1906).

⁸⁸ See Russell v. Registrar, supra, Spencer v. Registrar, 1908 A. C. 235. Under § 186 New Zealand act, the value of improvements so made, with interest from the date of deprivation to the date of judgment, may be allowed against the fund. As to recovery for improvements made by an occupying owner regis-

tered under an invalid certificate, See § 125 New South Wales act, and § 47 Queensland act.

⁸⁹ § 209 South Australia act. §§ 207, 211 Victorian act. §§ 201, 205 Western Australia act.

⁹⁰ Russell v. Registrar, supra.

⁹¹ Russell v. Registrar, supra.

⁹² Cox v. Bourne, 8 Q. L. R. 66 (1897). Papworth v. Williams, 20 N. S. W. L. R. 280 (1899).

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§ 207. Recovery From Fund, Notice of Loss Must be Given.

In many acts it is provided that notice of the loss must be given to certain officers for a certain period of time, from one to three months, before commencement of an action against the fund.⁹³ If it appears to certain officers that the fund is clearly liable for the loss, it may be paid on the certificate of these officers.⁹⁴ In Illinois a claim for damages may be presented to the county board, which may pay or reject the claim. But a rejection of it is no bar to the bringing of a suit in a court of competent jurisdiction.⁹⁵

§ 208. Who May Have Recourse to Indemnity Fund—Omitted Heir. In one of the acts it is provided that before making distribution of undivided registered land the executor or administrator shall file in the registrar's office a certified copy of the proof of heirship made in the proper court, which shall be conclusive evidence, in favor of all persons thereafter dealing with the land, that the persons therein named as the only heirs at law of the deceased owner are such heirs.⁹⁶ In this act there is no special provision for compensation from the fund for an heir omitted from such proof. But under the Ohio act any person deprived of any interest in land by being omitted in such proof of heirship, or such certified copy thereof, might within a given time bring an action for compensation from the fund.⁹⁷ A statute making proof of heirship conclusive against all interested persons is valid, provided such reasonable notice of the proceeding is given to such persons as will constitute due process of law.

§ 209. Payment of Claim Against the Fund. The fund is deposited with some official as custodian, and is invested by him, sometimes under the direction of some higher authority. After judgment is obtained against the fund, a warrant is drawn against it by certain officers. Under some acts, when the fund is clearly liable for the loss, a warrant may be drawn

⁹³ § 147 Manitoba act. § 99 British Columbia act. § 108 Alberta act. § 151 Saskatchewan act. § 128 New South Wales act. § 128 Queensland act. § 128 Tasmania act. § 208 South Australia act. § 180 New Zealand act. § 215 Victorian act. § 209 Western Australia act.

⁹⁴ § 180 New Zealand act. § 214 Victorian act. § 208 Western Australia act. § 106 British Columbia act. § 152 Manitoba act.

⁹⁵ § 102 Illinois act.

⁹⁶ § 75 Oregon act.

⁹⁷ § 98 Ohio act.

against it by certain officers, without the bringing of a suit and the obtaining of judgment.⁹⁸ If the amount in the fund is inadequate to pay the claim, such sum as may be necessary for that purpose is paid out of the general revenue, and the sum so advanced is repaid out of the fund as it accrues.⁹⁹ In other acts it is provided that if the amount in the assurance fund at any time is insufficient to pay any judgment in full, the balance unpaid shall draw interest at the legal rate, and be paid with such interest out of the money coming into the fund.¹ The Oregon act provides merely for the payment of a loss from the indemnity fund.² The Illinois act provides that claims for losses under the act may be presented directly to the board of county commissioners, that actions for such losses may be brought against the county, and that the indemnity fund is to be held to satisfy judgments obtained or claims allowed against the county for such losses, as far as it will go. Until the indemnity fund is exhausted, payment for such losses is to be made from it, but the county is liable for any remainder.³ When any sum of money has been paid out of the fund on account of the fraud or error of any person, it may be recovered from him, or, if dead, from his estate, at the suit of the registrar or the custodian of the fund.⁴

§ 210. When Damages May Not be Recovered From the Fund. Damages may not be recovered from the indemnity fund (1) when the interest in the land is recoverable, or to put it in another form, when the new certificate is not conclusive evidence of an indefeasible title as against the person injured, (2) when damages may be recovered from the person who caused the loss, (3) where the loss was caused or contributed

⁹⁸ § 180 New Zealand act. § 214 Victorian act. § 208 Western Australia act. § 106 British Columbia act. § 152 Manitoba act. § 102 Illinois act.

⁹⁹ § 42 Queensland act. § 186 New Zealand act. § 216 Victorian act. § 129 New South Wales act. § 210 Western Australia act. § 21 English act, 1897. § 98 Massachusetts act. § 99 Hawaiian act. § 103 Philippine act. § 148 Manitoba act. § 99 British Columbia act. § 86 Nova Scotia act. § 92

Act for Ireland, 1891.

¹ § 75 Minnesota act. § 86 Colorado act. § 85 Washington act. § 60 New York act.

² § 98 Oregon act.

³ §§ 101, 102 Illinois act, as amended in 1907.

⁴ § 183 New Zealand act. § 132 New South Wales act. §§ 217-219 South Australia act. §§ 155, 156 Saskatchewan act. § 111 Alberta act. § 90 Nova Scotia act. § 7 sub § 6 English act, 1897.

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to by the person who makes the claim, or by a person under whom he claims, (4) and when the loss was occasioned by any breach of trust.⁵ In British Columbia it is provided that no access shall be had to the fund for any error or shortage in area in any lot, block or subdivision, according to any map or plan filed or deposited in the office of the registrar.⁶ If a person had notice or knowledge that the registrar was about to commit the act complained of, and took no steps to protect his interests, he may not recover from the fund. As will be seen by reference to some of the sections just cited, under foreign acts the fund is not liable for any loss occasioned by the inclusion of the same land in two or more grants, or by any land being included in the same certificate of title with other land through misdescription of boundaries or parcels of any land, unless it is proved that the person liable for damages is dead, or insolvent, or has absconded. Some of the sections just cited provide that the fund shall not be liable for the improper exercise of any power of sale in a mortgage. No person may sustain any loss or be deprived of any interest in land by a judgment or decree of court establishing the rights and interests of the parties to the proceeding. The theory of the law is that a court having jurisdiction of the subject matter and of the parties, finds and establishes the rights of the parties, and that one who is not a party to the proceeding is not bound by its judgment or decree. In this country no person may be wrongfully deprived of any interest in land through the bringing of it under the provisions of an act, by the order of a decree in registration, and no damages

⁵ In some of the acts it is provided that the fund shall not be liable for any loss occasioned by any breach of trust, whether express, implied or constructive, or for a default committed by any trustee, guardian, committee of a lunatic or of a person of unsound mind, executor, administrator or other person standing in the relation of trustee to any other person. This is mere amplification, and is equivalent to declaring that the fund shall not be liable for any breach of trust. § 101 Massachusetts act.

§ 102 Hawaiian act. § 106 Philippine act. § 86 Washington act. § 76 Minnesota act. § 87 Colorado act. § 61 New York act. § 105 British Columbia act. § 151 Manitoba act. § 88 Nova Scotia act. § 167 Saskatchewan act. § 121 Alberta act. § 42 Queensland act. § 133 New South Wales act. § 133 Tasmania act. § 211 South Australia act. § 185 New Zealand act. § 202 Victorian act. § 196 Western Australia act.

⁶ § 105 British Columbia act.

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may be recovered from the indemnity fund for any cause arising prior to the original registration. This fact was fully realized by the framers of some of the acts in this country, wherein compensation from the fund is expressly limited to persons who may suffer loss or deprivation after the original registration of the title.⁷

§ 211 Registration Without Recourse to Indemnity Fund. Since in this country the benefit of the indemnity fund is limited to those who deal with the land after the original registration of it, it is proper to give to the first registered owner the privilege to elect whether he will register his land with or without the right of access to the fund. The New York act contains this provision: "Any person who states, at the original registration of property, that he takes such property without recourse to any action to recover compensation out of the assurance fund for any loss or damage or deprivation, shall not be required to make any payment on account of said fund, in which case the registrar shall plainly place on the certificate of registration of such property or any duplicate or certified copy thereof, the words 'without recourse to the assurance fund'. Nothing herein shall prevent any person owning registered property from making payment to the registrar of the said one-tenth of one per centum of the said local assessed value thereof, whereupon the owner of said property may thereafter avail himself of any right to recover compensation from the assurance fund, which right may thereafter arise; and on receipt of such payment the registrar shall cancel the words 'without recourse to the assurance fund' from the certificate of registration, any duplicate or copy thereof."⁸ The first certificate issued under the New York act was dated December 9, 1910, and was without recourse to the indemnity fund.

⁷ § 95 Massachusetts act. § 96
Hawaiian act. § 59 New York act.

⁸ § 58 New York act.

CHAPTER XVI

Exposition

§ 212. Essential Qualities of a System of Dealing With Land.

The establishment of records of deeds and of other instruments respecting land was coeval with the creation of many of the provinces along the Atlantic coast of this country. The establishment of such records and the creation of the office of custodian of them for Pennsylvania was agreed upon in 1662 in England between William Penn and the first purchasers of land from him, and after various efforts the keeping of different records and the doctrine of constructive notice was reduced to a system in 1715. For a great many years communities were small, land was cheap for the most part, and laws were directed more to effectuate general policies respecting lands and dealings with them than to form and establish a scientific system of conveyancing. The principles of the recording system, which are found in the statutes and decisions, have never been reduced to a specific code, and the requirements and conveniences of this system have never been considered in any proposed legislation. The system as an entity has never been kept in view in legislative enactments. It arises out of the laws concerning public records, the record of instruments, conveyances, mortgages, liens, courts, civil actions, chancery, administration of estates, wills and various other subjects which affect titles to land. In legislating on these subjects the controlling idea has been to formulate certain statutory requirements and to fix certain statutory rights, according to some general policy and public interest and utility, without any regard whatever to the effect of them on the established method of conveyancing and dealing with land. The result is that a system, simple in its elementary principles and capable of adaptation to varying conditions of public pol-

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icy, has been lost sight of and neglected in legislative policy. Some sixty years ago a code of laws was enacted in South Australia, establishing a system of conveyancing, the central feature of which was a governmental register on which the state fixed and exhibited the status and ownership of titles. This register was a dominant force in everything relating to the title to real estate, and for the first time a system of dealing with land became the subject of legislative care and solicitude for the perfection of the system itself. After it had been made workable and practicable, it attracted the attention of lawyers in this country, where a feeling against the lack of scientific method in our dealing with land titles had developed. Many persons thought that our system should be simplified and improved, that more insistence should be made on having the public records show all matters affecting title to and rights in land, and that more attention should be given to the recording system for the sake of the system itself. Others thought that the true way to deal with land titles was to subordinate any system to the demands of public policy, as they might be determined by acts of the legislature, and to supplement this elastic and pliable system with private contracts of title insurance. But there were others who thought that land titles should be made the subject of governmental certification, insurance and indemnity, and the Australian Torrens system, with certain necessary modifications, was adopted in several states of this country.

For several years there has been a vigorous discussion of the comparative merits of the Torrens system and the recording system, and it has not always been carried on temperately or with a display of great knowledge of either system. The books which have been published in this country on the Torrens system, and the articles and treatises on it, which have appeared in legal and real estate journals, have taken partisan views, and are mere briefs and arguments for or against the system.¹ They abound in general assertions, and they praise or decry in such a wholesale and indiscriminate way that their deductions are of little value. They are full of misconceptions

¹ Niblack on the Torrens System, a fair sample.
Its Cost and Complexity, 1903, is

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and misstatements, due to lack of knowledge and discernment. They fail to distinguish between those features which are essential to the Torrens system or to the recording system, and those features which have been attached to each system by specific legislative enactments or by a course of judicial decisions. Our judgments concerning the qualities of any system of conveyancing vary according to our knowledge, experience, interests and points of view, and a discussion of them by one person may not be satisfactory to other persons. But a work which assumes to be an analysis of the Torrens system should contain an exposition of its qualities as a system of conveyancing, and this exposition should be made in a fair and painstaking way. Special attention should be given to details, exact statements and full explanations, even to the point of prolixity and irksomeness. The best method of measuring and checking up the qualities of a new or proposed system is to distinguish it from a system with which we are familiar, and it is proposed to analyze the qualities of the Torrens system and of the recording system. A desirable system of conveyancing and of dealing with land must possess four qualities; it must be simple, secure, rapid and cheap. In order to confine our labors within bounds, we shall treat only of such matters as may throw light on these qualities in the two systems.

§ 213. Simplicity in a System of Dealing With Land. Simplicity is a relative term. What seems simple to one person may seem complex and intricate to other persons. Those things which we know and are familiar with are simple to us. No system of conveyancing is simple in an elementary sense. A simple system will give direct and positive results, without undue labor and inconvenience to those who deal with it, and it will not conflict with the duty of the legislature to pass such laws as are necessary for the general interests and well being of its citizens with respect to dealings with land. In an academic way it may be said that of the four qualities which a system of conveyancing and dealing with land should possess, simplicity is the least essential, but complexity in dealing with titles is apt to lead to insecurity and expense. The great claim for simplicity in the Torrens system lies in the fact, that,

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where its principles can be carried out under the laws of the country, it presents a result, a product, a certificate which, with certain familiar exceptions, is conclusive evidence of title in favor of the person registered as owner, and in favor of a bona fide purchaser for value. On the other hand, it is to be noted that the acts which declare certificates to be conclusive evidence of an unimpeachable title consist of from one hundred to two hundred or more sections, and that some of them are supplemented by numerous rules;² and from this point of view the Torrens system is not simple. When we reflect that there are more than six hundred adjudicated cases under the Australasian acts, we must conclude that the system is simple only sub modo and to a certain extent in general. But in all fairness it must be said that in an off-hand discussion of the Torrens system one may conjure up a thousand difficulties which appear to be almost insuperable, but which may be solved easily by practical application of the provisions of the acts. Study, with consequent knowledge, helps to simplify the Torrens system, just as it helps to simplify other things.

§ 214. Simplicity in Foreign Jurisdictions. Under foreign statutes the registrar acts as a judge in matters pertaining to registration of a title, and his decision is binding on all persons interested in the land, whether they are present or absent, and whether or not they had notice of his proposed action. He has jurisdiction to register titles, and to perform every act leading up thereto, as and when such matters are presented to him under the terms of the act. No want of notice, or insufficient notice of any application, no error, omission or informality in any application or proceeding, and no error of law as to the validity of the title may be urged to defeat an original registration by him. No error of law as to the construction and legal effect of an instrument may defeat a registration made by him on a transfer of an estate in land from the last registered owner. When he has performed his functions under the act, the statute declares his handiwork to be conclusive evidence of title. The state vests the title through the functions of the registrar. His power to pass on the rights of per-

² The English rules of 1908 number more than three hundred and forty, and they have the same force and dignity as statutory provisions.

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sons in land, in their absence and without notice, has been characterized in periodicals in this country as "czarlike" and "autocratic," but it is strictly judicial. In the absence of constitutional limitation, such a scheme of vesting title is a matter of legislative policy, and it is no abuse of general legislative power to declare that the decision and act of such an officer, within his limited sphere of action, shall be binding on the rights of all persons. He is supposed to follow the law in construing instruments, and, like other judicial officers, he must apply it in his own way in each case before him. The scheme of registration of indisputable title is feasible and simple, under the circumstances mentioned, and it is a great achievement.

The feature of the Torrens system, which creates one estate in land,—the registered estate,—instead of the legal and equitable estates, is simple in theory, but it has been modified in practice. While, for the purposes of dealing with land, a trustee may be regarded as the absolute proprietor, still this feature has been modified, sometimes by statute, and generally by custom and in practice, until at the present time notice of an equitable interest may be given by a beneficiary of the trust by filing a caveat which does not lapse, or it may be given by the state as a part of the registration by designating the registered proprietor as trustee, or by registering co-trustees with the words "no survivorship." No broad claim to simplicity in dealing with the registered estate may be sustained where there is a relation of trust on the part of the registered owner. Foreign writers merely say that the system is an attempt to return to the ancient doctrine of one ownership in land, but they do not claim that the return is complete³. The acts say that registration is a *sine qua non* to the transfer of estates or interests in registered land, and yet some courts hold that equitable estates may be transferred off the register.⁴

The principle of protecting by caveat or notice of adverse claim such rights and equities in land as may not be regis-

³ See ante § 162.

Stewart, 13 British Col. Repts. 111 (1907). See ante § 75.

⁴ *Entwisle v. Lenz*, 14 British Col. Repts. 51 (1908). *Westfall v.*

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tered seems simple, but it is in itself a recession from the doctrine of one estate in land. True enough, the state does not register rights and equities in land, but it permits interested persons to give notice of them on the register, and it refuses to make further registrations unless they are made subject to the rights disclosed in the caveat.⁵ In this country we have had little or no experience with this feature of the system, but in Australasia caveats are in common use. We have registered comparatively very few titles here, and have only begun to develop the system. The language in all the acts establishing this method of protecting rights is very simple, but there are in Australasia many more than two hundred cases which have passed on the sufficiency of registered caveats and on the caveating capacity of persons who have filed them.

The method of creating liens on registered land only by noting them on the register seems very simple. At first impression such an entry seems to be only a ministerial act, binding the land if everything is correctly done, but having no effect on the land in case of error. Nevertheless, it must be remembered that if the scheme of indefeasible titles is to be carried out, on foreclosure of the lien the new certificate must be conclusive evidence of title. There is no line of foreign decisions explaining the doctrines which apply to the entry of liens, and it is said that one cause of dissatisfaction with the Torrens system in England arises from the uncertainty of the effect of the provisions respecting notation of mortgages and other burdens on land. It is apprehended that the entry of a mortgage or lease on the register gives notice of the instrument, but is not conclusive evidence of the existence of a lien in favor of the mortgagee or lessee; that it does not give validity to the instrument, and if the latter is invalid for any reason, or has ceased to be a lien, the fact may be shown; that such entry has substantially the same effect as the recording of a mortgage or lease under the general law. All liens on registered land arising adversely to the registered owner must be noted in the same way on the register, but if a supposed lien arises without voluntary action by him, and not pursuant to any decree or judgment of court, specifically fix-

⁵ Ante § 117.

ing the lien on the land, is the notation conclusive of the regularity of any proceeding or instrument by means of which such lien arose, or of the validity of the lien? Has such a notation any greater force and effect than the recording or entry of a similar lien on unregistered land under the general laws? It would seem that such notations made by foreign registrars in their judicial capacities would have a very different effect from those made by executive registrars in this country. The creation of a lien by notation on the register is especially simple when the certificate is produced for entry of the notation, or where the description of the land is known to the person who desires to register the lien. In the latter case the page of the register can be located from the tract index in the office. But in case of a judgment, or of a proposed attachment, when it is not known what land, if any, the defendant has, the system does not afford any particular facility for obtaining a lien. The creation of a general judgment lien on the lands of the debtor is certainly very simple, but it is open to serious objections. Perhaps the only real advantage of the Torrens system with respect to liens is the grouping of them on one page of the register according to priority, instead of having them scattered through different records, to be brought together in an abstract of title to the land.

It cannot be claimed yet that the scheme of the indemnity fund is simple. All rights in the fund are purely statutory and are set forth in apt words in the sections of the acts directly relating to the subject, but they are also affected by some provisions of the acts, relating to other subjects. In the early acts in Australasia the scheme of indemnity was academic, but it has developed considerably by amendment of the statutes and by judicial construction during the past sixty years. The American acts and most of the Canadian acts follow the Australasian method of indemnity, but the English and Ontario acts differ greatly from these. Since a whole chapter in this work has been given to the subject of the indemnity fund, no analysis of it need be given here.

§ 215. Simplicity of Torrens System, Matters Affecting the Title in One Place, Condition of Title Shown at a Glance. The great claim for simplicity in the foreign Torrens system lies

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in the fact that it presents a result, a product, a register of estates in land, which, as a general rule, gives to the person registered as proprietor an indefeasible title to the estate registered. The exceptions to this rule are (1) the existence of a prior certificate for the same land, (2) a mistake in the description of boundaries, (3) fraud in procuring registration, and (4) error as to matters of fact, which may be rectified on the register.⁶ This register of estates in land may be relied on by a purchaser in good faith for value. He need not make a retrospective search of the history of the title and he will take an indefeasible title to the registered estate through registration in succession under the last registered proprietor. Perhaps the only exceptions to this rule are where unregistered land by mistake is contained in the register, and where two certificates are issued for the same land.⁷ The accomplishment of these two objects, except in such rare cases, is a great achievement, and it has caused enthusiastic admirers of the system to assert that everything relating to the title must be contained within the four corners of the page of the register, which has been set apart last for a particular piece of land, and that everything relating to the title may be found in one place on the register. This assertion must be distinguished. All estates in and liens of private persons on land must be registered in order to have any validity, and if the words "everything relating to the title" mean "everything relating to estates in and private liens on land," there can be no objection to it. But there are many rights and interests in land which need not be registered, and if these are to be included in the words "everything relating to the

⁶ Ante § 62 et seq.

⁷ Ante § 148 A purchaser in good faith for value does not always obtain an indefeasible title under the English acts. In § 7 English act, 1897 it is declared: Where any error or omission is made in the register, or where any entry in the register is made or procured by or in pursuance of fraud or mistake, and the error, omission, or entry is not capable of rectification under the principle act, any person suffering loss

thereby shall be entitled to be indemnified in the manner in this act provided. Provided that where a registered disposition would if unregistered be absolutely void, or where the effect of such error, omission or entry would be to deprive a person of land of which he is in possession, or in receipt of the rents and profits, the register shall be rectified, and the person suffering loss by the rectification shall be entitled to the indemnity."

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title," the assertion is entirely too broad. It is sometimes, though infrequently, said that the condition of the title to a piece of registered land may be seen at a glance at the register. From any point of view this statement is incorrect. The terms of mortgages and leases must be examined, and there may be instruments filed, but not yet entered. While one must look to the register for any estate in land, there are many things which do not appear on it,—taxes and special assessments for which the land had not been sold at the date of the certificate, public highways and public rights of user, rights of way or other easements, any subsisting lease or agreement for a lease for a time within a certain period fixed by statute, where there is actual occupation of the land under the lease or agreement, and the possibility of mechanics' liens. Conditions, restrictions, limitations and covenants running with the land are merely noted on the register, and the instrument containing them must be inspected in the registrar's office in order to determine their scope and legal effect. A writer who has given the subject of the register a thorough consideration has said: "Registered estates and interests and equitable rights * * * do not together exhaust the field of possible rights in or to land under the (Torrens) system. There is a residuum of rights, neither registered nor merely equitable, which closely resemble 'legal' rights of the general law; they are not liable to be defeated by any change of ownership of the land, but remain inherent in, or attached to, the land in the hands of each successive owner. * * *

The chief characteristic common to all these inherent rights is that their existence can be ascertained with comparative facility;⁸ in their constituting an exception to the general rule of the Torrens system which requires all interests to be registered as a condition of binding land into whosoever hands it may come, the principle on which that rule rests is not unduly violated. Inherent rights are either (1) connected with the visible user or actual occupation of land; or (2) in the nature of public rights created by the general statutes and ascertainable without difficulty. They appear to consist of the six following classes: (1) Rights arising from mere occupation, and also from the existence of a tenancy of some kind under another person, (2) easements, (3) public rights of user, (4) taxes and other public burdens, (5) estates created

⁸ See *Martin v. Cameron*, (1893) 12 N. Z. R. at page 772.

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on expropriation of the land for public purposes under powers conferred by the general statutes, (6) rights of the Crown.”⁹ In dealing with land, whether registered or unregistered, all these matters must be inquired into, and the inquiry must be made in the same way in each case. In urging that the weakness of the recording system lies in the fact that the state does not insist on the public record of all matters affecting the title to land, the statement has been made *ad captandum* that an intending purchaser under the recording system at his peril must examine every person who may reside on, or who may be in partial possession of the property, to see “whether by chance he has not an unrecorded contract of purchase or deed to the property concealed about his person.” Under the Torrens system rights under a contract of purchase may not be registered, but they may be protected by caveat, and a deed must be registered in order to vest title in the grantee. An intending purchaser of registered land under most acts need not inquire of persons in possession as to these matters, but in order to ascertain the exact condition of the property he must inquire into rights of possession. With “comparative facility” and “without difficulty,”—to use the expressions contained in the last quotation above,—this inquiry may be extended to include a contract of purchase or an unrecorded deed. The burden of making inquiries of occupants of registered land is not measurably increased by extending it to both rights of possession and estates in land. The main point is that under the Torrens system there is no escape from the necessity of inquiry of parties in possession, unless the system is made so tight as to be unworkable and cumbersome. If under this system there were no need of inquiry as to rights of persons in possession and as to the condition of the property at the time of the sale, mechanic’s lien laws would be absolutely inapplicable to registered land. At the registry offices in this country persons about to deal with registered land are plainly told that the register relates to estates in land and private liens only, that searches must be made for taxes and special assessments, and that inquiries must be made as to rights of possession, and as to mechanic’s liens, public highways and ease-

⁹ Hogg, *Australian Torrens System*, pp. 804, 805 Ante, §§ 62, 121.

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ments. In Chicago certificates of title under the Torrens system have the following notice printed on them: "Caution. This certificate does not certify to special assessments or current taxes. Upon each transfer a search is made by the registrar showing them. Prospective purchasers of registered property may obtain the same on application prior to transfer." A person does not purchase a piece of real estate merely because he has examined the register and is pleased with the condition of the title. He buys it because of its location, improvement, rent roll, etc., and because, after inspection, he desires it. The dedication of a public road is not affected by the registration acts. The existence of a road through a piece of land puts an intending purchaser on inquiry.¹⁰ He must also inquire about the possibility of mechanics' liens on the property. Under one act all registered land is subject to tenancies created for any term not exceeding thirty-one years, or for any less estate, in cases where there is occupation under such tenancies.¹¹ Other acts provide for unregistered leases for three years or more. It is not an essential feature of the Torrens system that possession of land shall not be notice of the rights of the occupant to an estate in the land. In some of the states of Australia a certificate of title is declared to be subject "to any rights subsisting under any adverse possession,"¹² and in those states inquiry must be made of an occupant as to his rights in and claims on the land.

§ 216. Simplicity in Non-Essentials of Torrens System. We have now treated of the simplicity of the seven essential features of the Torrens system. We have heretofore referred to the mass of provisions contained in the Torrens statutes which determine matters of general policy respecting dealings with registered land, or which regulate mere matters of detail respecting such dealings.¹³ As determining matters of policy we have seen that under some acts fee simple titles only may be registered, while under others lesser estates may be registered; generally only indefeasible titles may be registered, but

¹⁰ *Martin v. Cameron*, 12 N. Z. 1875.
L. R. 769 at page 772 (1893).

¹² See ante §§ 122, 124.

¹¹ § 47 Act for Ireland, 1891. 21
years in England, See § 18 act of

¹³ Ante § 160.

titles which are defeasible are registered also; some acts declare the effect to be given to forged instruments, and others are silent on the subject; an adverse occupant of land may lose his rights when land is brought under the act, or the registration may be void as to him unless he is notified, etc., etc. As regulating minor details we have seen that a certificate may or may not be issued to a mortgagee; that statutory forms must be used under some acts, and that ordinary forms of conveyancing may be used under others, etc., etc. Such matters are controlled by the framers of the acts, and may be fixed at their discretion. While they may tend to make the system work easily or clumsily, in considering the simplicity of the system they are non-essentials.

§ 217. Simplicity in the American Torrens System. The simple method of original registration by the state through the act of the registrar is not adapted to our laws under our constitutional limitations, and such registration may be made only by a decree of court, obtained in an adversary proceeding against all the world. The entrance to the Torrens system is not simple, rapid or cheap, where it is through and by means of a law suit,—hostile litigation,—in which stale and unenforceable claims may be revived and enforced, and to which no one can foresee the end. In simplicity, the method of original registration in this country is far removed from the foreign method. The incapacity of the registrar to exercise judicial power here affects also the simplicity of successive registrations of registered land. Since no act of his, in passing on the legal effect of an instrument and registering it, has any binding force as an adjudication on rights or interests in land, no vesting of an indefeasible title in a new registered purchaser of the land takes place by the mere fact of his registration, and, the statutory declaration of the conclusiveness of the certificate is unconstitutional and void. Our legislatures are powerless to declare a certificate conclusive evidence of title, when it is issued by a ministerial officer and without due process of law. In this country legislative attempts to make the production of a certificate of title authority to a registrar to make a new registration, and to vest indefeasible titles through the functions of the register itself, are

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abortive. It is apprehended that no record may be made conclusive here, in favor of a stranger to it, who deals with the subject matter of it, except a judicial record which is not appealed from, and concerning the execution of which no supersedeas has been issued, and such a record binds those only who are parties to it. There can be no application here of the elementary principle of the Torrens system, that a bona fide transferee for value of registered land takes the title with which he is registered, provided only he has dealt with the last registered owner.

With respect to the feature of the system, which creates one estate in land, the American system does not make for simplicity. When the land is registered "in trust," "upon condition," or "with limitations," it may be dealt with only on an order of court, except that a trustee with power of sale generally may alienate the land pursuant to his power.

§ 218. Simplicity, Essential Elements of the Recording System. The essential principles of the recording system are:

First: Voluntary instruments affecting titles to land may be executed in any place where the parties meet, and they take effect on and by the execution of them by the parties. Since the act of the parties to an instrument, in delivering it on the one part and in accepting it on the other, operates on the title to land, the transfer and conveyance is made in virtue of the estate, interest or power vested in the party making the grant. Generally speaking, no person can convey to another an estate or interest in land, which is not vested in him, unless he has a power to convey it.

Second. A public office is established in which voluntary instruments affecting titles to land may be filed, to be transcribed in full on permanent and public records. The act of filing or transcribing an instrument in this office does not give to it any added force or validity, but it gives to the world constructive notice of the contents of the instrument, and of all rights which may be claimed under it. Recording an instrument is not compulsory, but a person claiming under it imperils his interest in the land by failing to record it. As against the grantee in a prior unrecorded instrument, a purchaser for value without notice from the same grantor, on

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the record of his instrument, takes a good and valid title to the estate or interest in the land described therein. The record preserves to persons claiming under the instrument the evidence of its contents.

Third: Records of writs, proceedings, judgments and decrees of courts, records of the probate of estates, and records of commissioners of highways in counties and cities, have such effect on land titles, and such effect as constructive notice, as is prescribed by law.

Fourth: Notices of special liens are filed and recorded in the offices prescribed by law.

Fifth: Taxes and special assessments on land are spread of record in public offices and are liens on land.

§ 219. Simplicity, Recording System. A general principle of the recording system is that a grantor in a sufficient deed, having an interest in land or a power to convey it, conveys it to the grantee by the delivery of the deed. Most statutes on the subject of conveyances in this country prescribe the elements which make a deed sufficient. They may require that deeds shall be under seal, that they shall be subscribed by witnesses, that they shall contain certain words of grant, that they shall be acknowledged before certain officers in a certain manner, and that a certificate of acknowledgment shall be in a certain form. When such requirements are made they become a part of the recording system of conveyancing, but they are merely incidental. For the working of this system the requirements as to forms of conveyances should be few and simple. In this country all the Torrens acts provide that like forms of deeds and other instruments as are now or hereafter may be sufficient in law for the purpose intended may be used in dealing with registered land and any estate or interest therein; and no other form of instruments is provided in the acts. The recording system establishes public and permanent records, on which may be set out in appropriate ways estates in, liens on and claims to lands. With respect to these records the laws are not the same in all states, but the variations do not affect the system materially; it adapts itself to the laws as they are established. It does not require any particular set of laws with respect to constructive notice

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of instruments filed for record. In some states a person does his whole duty when he files an instrument for record, and the filing of it gives constructive notice of its contents to all the world, whether it is recorded correctly, or whether it is ever actually recorded; in other states the burden of seeing that it is recorded correctly is on the person who claims under it. The law may declare that a deed or mortgage shall not be constructive notice until it is filed for record, or it may declare that anyone claiming under such an instrument shall have a certain number of days in which to file it for record, and thus give notice of his rights under it.¹⁴ It may declare that a mechanic's lien shall operate only from the time of filing notice of it in the proper office, or it may declare that, if it is filed within a certain number of days after completion of the building, the lien shall relate back to the time of the commencement of work on the building. This retroactive force and relation back of constructive notice of a deed or lien interferes greatly with the scientific working of the system, but in such matters the recording system follows the legislative policy for the public interest. It has been insisted that it is contrary to the elementary principles of the Torrens system that a mechanic's lien shall relate back, and that any such effect is obstructed by the provision of the Torrens statutes, that "until filed and registered, no such lien shall be deemed to be created." But the better opinion seems to be that when such a lien is registered and created, it relates back, because a purchaser is bound to make inquiry into the condition of the property and into the rights of persons in registered land, and because a statutory lien is governed by all the terms of the act under which it arises.

§ 220. The history of the early recording acts shows that when they were passed it was supposed that persons dealing with land might rely on the records to show all matters affecting estates in or liens on land. But most of the acts did not contain a statutory declaration, direct or indirect, that no notice of matters off the record should affect the right of per-

¹⁴ In Indiana a grantee in a deed has forty-five days in which to file it for record, and if it is filed

within that time it is constructive notice from the date of the delivery to him.

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sons to deal with estates in land as disclosed by the record, and in most of the early cases courts construed the statutes to make them conform to equity and good conscience. In most states the doctrine became firmly established that a dealer with land was affected with notice of an unrecorded instrument respecting the title, whether his notice was actual or constructive. But where the statute provided that instruments should have no validity against purchasers for value and creditors until they were recorded, and where they provided that the priority of instruments should be fixed by the order in which they were filed for record, it was held that instruments become operative only after they have been recorded, and that no notice, however full and formal, will supply the place of recording.¹⁵ Rights and claims of persons in possession of land had been protected by the laws for centuries. Livery of seisin under the old law stood in place of our modern recording acts. It was a rule of public policy that possession of land was constructive notice to all persons of the rights and claims of the person in possession. It was judicially declared that this rule was not abrogated by the recording acts, and that strict inquiry as to all rights and estates in land must be made of all persons in possession of it. It is competent for the legislature to prescribe laws respecting dealings in and conveyance of lands within its jurisdiction for the best interests of the citizens of the state, and it may declare that one who deals with land may rely solely and implicitly on the public records for all estates or interests in land. An unrecorded deed is good as against the grantor and his heirs; the record is intended for the benefit of purchasers and creditors. The statute may modify the principle that an instrument affecting land takes effect on and by its execution, by declaring that the record of it shall be one of the essential elements of its execution, and upon such statutory modification the recording becomes a condition precedent, and no title passes unless and until the instrument is recorded.¹⁶ The statute may forbid the question of notice, other than that furnished by the records,

¹⁵ Robinson v. Willoughby, 70 N. C. 358. Bercaw v. Cockrill, 20 Ohio St. 163 Stansell v. Roberts, 13 Ohio 148; 42 Am. Dec. 193.

¹⁶ Morton v. Edwin, 19 Vt. 81. Giddings v. Smith, 15 Vt. 344. Nichel v. Brown, 75 Md. 172. Gage v. Reid, 118 Ill. 35.

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to be litigated, and may declare that instruments respecting land shall take effect in the order in which they are filed, aside from any inquiry as to other notice. Such a declaration would restore the original intent of the recording acts and would render the recording system more simple and effective as a system. It is a general rule of the recording system that a purchaser of land in good faith for value may rely on the condition of the title as disclosed by the record. This does not mean that a purchaser must actually examine the records and know what is contained in them, in order to be protected by them. He may purchase the land without inspecting the records, and, under the doctrine of constructive notice, still be entitled to all the protection afforded by them.¹⁷

Proceedings in court are instituted and conducted according to the law of the land, and there is nothing in either the recording system or the Torrens system, which demands that such proceedings shall be conducted in any particular manner. These systems are concerned only with notice of the institution of suits affecting land, and with the determination of suits which affect or may affect land. Notice of *lis pendens* as to registered land must be entered on the register in order to affect persons subsequently dealing with it. Under the recording system, the law in some states requires notice to be entered in a *lis pendens* docket, and in other states service of process on the record owner of the land gives notice of *lis pendens* according to practice in chancery. On the determination of a suit affecting specific land, the judgment or decree of court at once becomes effective on the title if it is unregistered; if it is registered a certified copy of the judgment or decree must be filed with the registrar, and a suitable entry must be made on the register. Under the Torrens system, a judgment of court does not become a lien on land until it has been noted on the register. In some states, but not in all, a judgment for damages rendered by a court of general jurisdiction is a lien on all the lands standing in the name of and owned by the judgment debtor. In counties where land is subject to the lien of judgments rendered in one or two courts

¹⁷ James v. Newman, 147 Iowa 574; 126 N. W. Rep. 781 (1910). Mann v. Jummel, 183 Ill. 523; 56 N. E. Rep. 161 (1899).

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only, the scheme of general judgment liens is defensible, but in most counties and states, the scheme may be characterized properly as diabolical. Any suggestion that it is a part of the recording system is erroneous. The legislature in its discretion may establish or may abolish the general lien of judgments.

§ 221. Comparative Simplicity of Torrens System and Recording System. Enough has been said of the recording system to show that as a system it has been neglected, and that general legislation concerning lands in this country has been directed toward the accomplishment of some particular object, and has been enacted without any view to the requirements and conveniences of any method of dealing with lands. But neither the Torrens system nor the recording system can require the records to show everything affecting title to or rights in land, without making it harsh, drastic, unattractive and cumbersome. When a system is very strict and inelastic, courts distinguish and legislate in construing the strict letter of the law, just as they have done with the Torrens statutes respecting notice of trusts, and respecting knowledge on the part of purchasers of rights and equities not shown on the register,¹⁸ and just as they did in construing the early recording laws. They are inclined to insist that there is a general system of jurisprudence which must be administered, as well as a system of conveyancing. While the Torrens system does not require that all matters affecting the land shall be shown on the register, it is insisted in most countries that all estates in land shall be exhibited there.¹⁹ But it has no monopoly of this method. Everything which is required to be of record under the Torrens system may be required to be of record under the recording system. With respect to mechanical features, one system has no particular superiority over the other. Each system requires large space in public buildings, many assistants and clerks and large alphabetical and tract indices, and each accumulates a mass of records.²⁰ Great vigilance and care are necessary under both systems, but the character of the

¹⁸ Ante § 141.

¹⁹ But in Tasmania, Victoria and Western Australia the occupation of land is notice of all the rights

and estates of the occupant. See ante, §§ 122, 124.

²⁰ Ante §§ 174, 175.

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work under the Torrens system demands that many of the assistants shall be persons of skill and learning in the law of real property.

When all is said which can be said about the comparative simplicity in elemental qualities of the two systems, the substantial result narrows down to a small compass. The Torrens system presents one record which certifies to an indefeasible title to the registered estate in land, save as to three exceptions, and shows the condition of the title, except as to a few things which must be found aliunde.²¹ The weakness of the recording system is that it has several records on which the history of the title is written, that the essential minutes of these records must be gathered into an abstract of title, and that this abstract gives no direct results or finished product in the way of an authoritative declaration of the title. Title by deed cannot be demonstrated as an ascertained fact, but presents a fact deducible from documentary evidence. An abstract of title means nothing to a man merely because he has education and intelligence, but it must be examined by some person learned in the law of real property, in order that the resultant facts as to the title may be ascertained. Custom and prudence have ordained that there must be a repetition of this examination on nearly every transaction with the land. An examination is made in order to determine two things,—whether the title is safe-holding, and whether it is marketable and merchantable, so that the next purchaser will accept it. Such examination usually will include all the records of evidence of title, and will be made by the attorney of the person about to part with his money, even though the title may have been examined for some other person in like circumstance a few days before. The intending purchaser or mortgagee may not know the attorney who made the last examination, or he may have special confidence in the opinion of his own attorney, and, again, he has no contractual relation with the attorney who made the examination for some other person and he has no protection in relying on the opinion of that attorney. Under foreign Torrens systems, on the other hand, an examination of the title is made once for all, the retrospective character of

²¹ See ante § 215.

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titles is eliminated, and any examination is confined to the possession of the land, to certain rights which may not be registered, to the special terms of mortgages and leases, and, in some cases perhaps, to the legal sufficiency of involuntary liens which may be noted on the register. When this indefeasibility of title presented on one register is compared with the dependent character of titles derived from many sources and from many records under the recording system, the simplicity of the Torrens system of conveyancing and dealing with land appears clearly. In this country, where there is no examination of the title by the government once for all, we have established the scheme of title insurance to cure the lack of simplicity in dealing with land under the recording acts. As to dealings with land under our Torrens acts, we are confronted with the question whether there can be such a thing as a registrar's certificate which is conclusive evidence of an indefeasible and indisputable title to land against all the world.

§ 222. Recording System Supplemented by Title Insurance.

In small communities, where titles are simple, the recording system works well and satisfactorily, and efforts to improve it are not appreciated. In the cities and older communities, where abstracts of title are long and complicated, and titles are complex, the weakness in the recording system, which we have just noted, was felt long before there was any suggestion of adopting the Torrens system in this country. It was recognized that this weakness was inherent in the system itself and could not be overcome directly by modification or amendment. A plan was devised to supplement it by the issue of collateral contracts of title insurance by a private company. Title insurance is a contract to indemnify the insured, within a specified amount, in his interest in real estate as therein set forth, against loss by reason of defects in the title existing at some date stated therein. The first of such contracts was issued by The Real Estate Title Insurance and Trust Company, of Philadelphia, Pa., on June 24, 1876, but many similar companies now do a title insurance business. A title declared by the state to be indefeasible seems to be much more desirable than one which is guaranteed merely by a private corporation. It is

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pleasing to think of a certificate which, in all courts and in all places, is conclusive evidence of the title with which we are registered, but it is somewhat startling to remember that, as a result of the quality of conclusiveness, the certificate of a person registered as owner of our land may vest our title in him and deprive us of our property. As an auxiliary to indefeasibility of title, there is an indemnity feature to the Torrens system, and from the indemnity fund compensation may be paid to a person from whom an interest or an estate in land has been wrested by the operation of a certificate. The registered owner holding the certificate, takes the title, and needs no indemnity, but since his certificate does not include within its provisions taxes, special assessments, easements, public highways or mere rights of possession, he must see to these things himself. Title insurance operates on directly opposite principles, and only the holder of a policy is entitled to compensation under it. While the scheme of title insurance does not present any official or governmental declaration of the validity or merchantability of a title, or any indisputable certificate of an indefeasible title, yet a title policy of a company with large capital and experienced examiners, insuring the condition of a title on a certain date, is recognized generally as fixing on that date the status of the title for the purposes of holding it or of dealing with it, and is an acceptable substitute for a government certificate of indefeasibility of title. When it is so recognized, it does away with the necessity for an examination of the title prior to that date, and presents the condition of the title in one guaranteed certificate. Title insurance takes the laws of the recording system as it finds them, presents a definite result, a finished product, a certificate which guarantees the condition of the title as it presents it. It covers a loss which may be sustained by reason of any defect in the title, not specifically excepted by its terms. It covers loss by forgery, whether the forged deed is the last instrument in the title or is back in the chain of title. Under the general Torrens system, a person claiming immediately under a forged instrument of transfer or mortgage takes no interest in the land by his registration, and can obtain no compensation from the

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indemnity fund when his registration has been set aside.²² In Australia title insurance companies have been characterized as "peculiar institutions * * * evolved to protect owners and purchasers of land."²³ Title insurance is the product of our own laws and the outgrowth of our own system of dealing with land, and it supplements and simplifies the working of the recording system.

§ 223. Simplicity in Titles. It is necessary to bear in mind that simplicity in a system of conveyancing and dealing with land is one thing, and that simplicity in titles to land is an entirely different thing. The simplification of titles to land may be accomplished only by eliminating from them all the elements which make them complex, namely, trusts, conditions, limitations, equities, covenants, reservations and forfeitures. Simplification of land titles is not necessarily a part of any system of conveyancing, but may be provided for under any system. Many of the registration acts were entitled as acts to simplify titles to land, but the acts themselves contained no suitable provisions for that purpose beyond prohibiting the entry of trusts on the register and establishing one estate in land, the registered estate, instead of legal and equitable estates. Concerning the general intent of the framers of the early acts to revolutionize the law of real property, as well as to establish a new system of dealing with land, it has been said: "There can be little doubt that Torrens intended, and that a possible result of the 1857 statute standing alone would have been, to effect a much greater revolution in real property law than has been effected by the Torrens system as it now exists. It has been said²⁴ that the preamble (to the original act)²⁵ is not found in the later statutes 'because attempts were made to follow out its spirit so as to cause § 1 to be construed as an enactment to not only sweep away the whole body of English conveyancing practice, but the principles of English law also, which latter it was found could not be entirely ignored with advantage, even under the new system.' The 1857 statute seems to have been intended to effect a reform, somewhat analogous to that effected by the statute of frauds in abrogating oral conveyances, by which no trans-

²² See ante § 203.

²³ Duffey and Eagleson, *Transfer of Land Act, 1890*, (Victoria) p. 3.

²⁴ Citing *In re Martin*, (1900) 27

S. A. R. at p. 79, and *Cuthbertson v. Swan* (1877) 11 S. A. R. 102.

²⁵ See Appendix.

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action of any kind with land could be effected without registration. * * * Some of the provisions which have been expressly abrogated, or have become obsolete, are interesting, besides being curiosities of legislation, as indicating that the intention of the framers of the statute was literally to revolutionize the whole law of real property, so far as it concerned land under the new system. This intention, however, was not carried out, chiefly because it would have been almost impossible for judicial tribunals to place any construction on the enactment which would make it at once intelligible and consistent with itself. Notwithstanding the progress of the system towards consistency and intelligibility since its inception in South Australia in 1858, it can hardly be doubted that many of its existing imperfections are due to the lack of technical legal knowledge, which is displayed in the draftsmanship of the original statute. In England, on the other hand, the presence of a high degree of technical legal knowledge in the framers of analogous acts appears to have contributed in some measure to some of the imperfections of the English system of registration of title, by tending to preserve legal formalities which are really unnecessary."²⁶ For some time after the passage of the early acts it was supposed that they abolished all trusts in registered land, but the statutory provision, that no notice of any trust shall be entered on the register, has been whittled away by construction of other provisions in the acts and by statutory amendments, until little substantial is left of it and of the theory that a purchaser may deal with a trustee as the absolute owner of the land.²⁷ There was a feeble attempt to hold that covenants, conditions, reservations, etc., in an instrument could not be noted on the register,²⁸ but most acts expressly provide that they may be. The evolution and development of Torrens acts have been along the lines of freedom of contract with respect to registered land, and not toward the elimination of elements which make titles complex, and it cannot be said today that registered titles are any more simple than those which are not registered. Anyone who has studied the Torrens system of conveyancing, and has directed his attention to the necessities which are required for its full development, is impressed with the close connection between the laws regulating the registry of titles

²⁶ Hogg, *Australian Torrens System*, pp. 23, 24.

²⁷ Ante § 97 et seq.

²⁸ Ante § 87.

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and the general laws of real property. Facility of transfer of land, facility in registering titles, and simplification of titles act and re-act upon each other, and the laws governing real estate should be simplified prior to or concurrently with the establishment of the Torrens system.²⁹ On this subject it has been said: "To establish a register of title before reforming the law so as to render the success of such a system possible, would be to put the cart before the horse."³⁰ If we admit that there should be a reform of the law of real property, we shall disagree hopelessly as to the nature and extent of the reformation. We may agree that we should abolish the antiquated and partially understood doctrines of tenure, seizin and uses, but we may not agree on abolishing executory devises and contingent remainders, and on retaining only an absolute ownership in land, a simple mortgage and leases—say not exceeding a term of ninety-nine years. Titles may be simplified whenever land owners, and members of the public who hope to be such, are willing to give up the privilege of creating trusts by deed or will, and of carving out lesser estates and interests than a fee simple. We can simplify titles by prohibiting the conveyance of land otherwise than absolutely and unconditionally. In this country we cannot convert complicated titles into simple ones, but we can prevent complicated titles being created in the future. The literature of the law of real property is full of suggestions for reform and simplicity in titles, and full of criticisms of and objections to these suggestions. In the process of time and evolution, doubtless, titles to land will be simplified, but in the past our efforts have been feeble and spasmodic.

§ 224. Security in Dealing With Registered Land. It is frequently said that security of tenure is the main object in any system of dealing with titles to land. This is a vague statement. Does it mean that by following the processes of the system a person should be able to take an indefeasible title to land purchased by him, or does it mean that he should

²⁹ § 97 Report of Royal Commission on the Transfer of Land Acts, 1911, page 49.

³⁰ Land Transfer and Registra-

tion of title in Ireland. Right Hon. Dogdson H. Madden, M. P., Attorney-General for Ireland, 1892, page 24.

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be able to hold his title, when once acquired, except as against his own acts or his culpable negligence? These two principles are conflicting, and both may not exist in the same system. Under the general Torrens system the object is to produce a register of title, on which a purchaser for value or a creditor may rely implicitly, and when he is registered in due course he takes the estate or interest with which he is registered. It follows from this that a former registered owner may be deprived of his estate or interest in the land by the registration of another person as owner of an estate or interest in the land. He may be deprived of his land by the combined result of a forgery and successive registrations,³¹ or by the levy on his land of an execution really issued against another person.³² We must conclude from this that the security of tenure aimed at by the Torrens system is that of taking with certainty an indefeasible title by the last registration, that, in accomplishing this, the system sacrifices the security of tenure under prior registrations, in favor of the last registered owner, and that the system is merely one of conveyancing and not one of holding safely and securely titles once acquired. There are only a few exceptions to the rule of the system that a new registered owner takes the registered estate or interest in land securely. (1) He must take under a transfer from the last registered owner. (2) A registered owner must be able to trace a line of registrations back to the first original registration of the title, and if by mistake registered land is described in two last certificates, the person who can so trace his title will be able to set aside the registration of the other. (3) If unregistered land is included by mistake in a certificate, the registration may be set aside. These exceptions are neither numerous nor likely to arise in practical operation of the system, and it may be said most confidently that the security of a person dealing in good faith for value with registered land is almost perfect under the general foreign system. But the English act modifies the rule of indefeasibility of title in the new taker in some instances,³³ viz,—in cases where there is an error, and in cases where the purported instrument of trans-

³¹ § 127 et seq.

³² Ante § 116.

³³ See note to § 215, ante.

fer is void,—and, with respect to security of tenure, places titles to registered land on the same plane with titles to unregistered land. In this country also a certificate of title, for lack of conclusiveness, gives no special security to the person who takes the title on a transfer of land,³⁴ and leaves the rule as to security of tenure as it is under the recording system. Under this, the transfer may or may not convey an indefeasible title, according to the whole history of the title, and no one may be deprived of his land except by his own act or through his culpable negligence. But the general foreign system helps to market titles by vesting them, under the statutes, through the functions of the registrar, in persons dealing with land, and, when necessary to accomplish this result, it divests titles from innocent persons who have no chance to be heard or to protect themselves.

§ 225. Security Under the Recording System. The defects, dangers and anomalies of the old system of conveyancing in England and Australasia have been pictured very vividly. It has been said: “The old system of conveyancing was responsible for great delay, expense and uncertainty. It militated against the marketableness of land. It led to elaborately planned concealments extending over generations. It placed the sword of ruin over every solicitor’s head. * * * This process of examining and abstracting all previous titles and facts relevant thereto had to be gone through whenever a new sale or mortgage took place, for a mistake in a link of title would probably make the solicitor liable to a ruinous action for negligence. Add to the uncertainty, complication and expense inevitable in such a system, the lengthy recitals and parcels of the purchase-deed, its formality of seal and delivery, the doctrine of constructive notice, the technicalities of the wording in premises and habenda, the fiction of the legal estate and its sequelae in the case of mortgages, the shadowy equities ‘born of fraud and fear’ haunting the most perfect conveyances, the subtleties of the judicial amendments and repeals of the statute of uses, weak-kneed remainders without an antecedent estate, or limitations of chattels real without a trust, receipts for consideration sacreligiously omitted from the indorsement of a deed, scholastic ‘possibilities on possibilities’ stalking through modern daylight, unusual covenants, ‘fruitful mother of costs,’ and estate clauses barren of estates, covenants

³⁴ Ante §§ 83, 166.

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for title that may be construed as notice of a flaw in title, and the constant fear of long and complex proceedings in the courts from some unsuspected deed coming to light—add these, and it is not difficult to sustain the proposition that reform was desirable, and that a system which has got rid of most of these incubi, with at least as much security as before, has claims for, as it has been found worthy of imitation.’³⁵

This arraignment of the old English system may seem to be rather hysterical, but at any rate it has only a modicum of application to the recording system in this country. Under this system the process of examination must be gone through almost every time property is sold or mortgaged, and the burden of determining the condition of the title devolves on a lawyer. But lawyers who are prepared for the work are not overwhelmed with the sense of responsibility, and they are able to find in the statutes and in the decisions of courts the landmarks which show the way of the title. The system of records is adapted to our jurisprudence, and the rules of constructive notice are well settled. While the recording system is capable of a high degree of perfection, and has been developed in a more scientific way in some states than in others, yet it needs thorough overhauling and extension everywhere. Though there is no general complaint against the lack of security of the recording system as a system, lawyers in each state know points at which it is weak and lame, and they guard against them in their examination of titles. In Illinois notice of *lis pendens* is given in the chancery method, by service of process on the owner of the land as shown by the record. This method makes it possible for the owner to convey the land to another record owner between the issue and the service of process, especially where service is by publication of notice, and gives an opening for delay, expense and a miscarriage of the whole proceeding. And again, where lands of tenants in common lie in more than one county in the state, a suit for partition of all the lands may be brought in any county where part of the land lies, and there is no statutory requirement that a notice of *lis pendens* shall be filed in the other county or counties, in order to affect the lands which lie therein. A tenant in common appeared of record to be the owner of an un-

³⁵ Duffy & Eagleson, *Transfer of Land act, 1890*, Victoria pp. 6, 7.

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divided interest in valuable land in one county and he mortgaged it for a large sum of money. At the time this mortgage was given, proceedings were pending in another county for partition of land in both counties, including the land so mortgaged, and the court had obtained jurisdiction of the mortgagor. Consequently, the purchaser at the partition sale took a good title, free from the lien of the mortgage, and the mortgagee lost the security for his debt, though he relied on a record which showed that the mortgagor had an estate in the land.³⁶ This case illustrates that where a system is so framed as to give notice on the record of everything which may affect the title to land, a burden may be taken from the shoulders of one person only to be placed on the shoulders of some other person. If the law had required a notice of the pending suit in one county to be filed in the other county where the land was mortgaged, in order to affect the land there,—and this is the requirement of all Torrens acts,—the purchaser at the partition sale would have been obliged to know at his peril that notice had been given as required, or that no dealing with the land had taken place during the pendency of the suit. But it is no hardship to require that an intending purchaser shall search the records, and it is a hardship for the state to furnish records which may not be relied on when searched.³⁷

§ 226. While the system of recording instruments is defective in perhaps all the states, no general charge of insecurity of titles under the recording system may be made. Immense sums of money are invested in real property without the slightest misgivings as to the validity of titles. When we consider the vast number of dealings with land, which take place on every business day of the year, we must expect to find many cases of litigation over questions of title, and taking into account the comparative number of dealings with land, we find quite as much litigation over real property in Australia under the Torrens system as we find here under the recording sys-

³⁶ A case mentioned by R. W. Boddinghouse in an address before the Illinois Abstracters Association, Real Estate News, Chicago, July 1910.

³⁷ It may be noted that no notice of the right to contribution as between tenants in common is provided for under either system.

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tem. It is a mistake to suppose that a mere system of conveyancing will prevent litigation concerning lands. Titles may be indefeasible whether or not they are declared by the state to be so. Most litigated questions are not concerning the validity of the main title to land, but relate to collateral matters, and the statutory declaration of indefeasibility will not simplify all questions of this character, or give security against the litigation of them.³⁸ A study of the decisions under the Torrens statutes gives one the impression that while the system solves certain complications in titles on the one hand, it brings in new complications on the other hand. For instance, it introduces caveats, about which there are scores of decisions; it introduces an officer, the registrar, who acts both judicially and ministerially, and it creates an indemnity fund against which statutory claims only may be made. After all is said, the great achievement, main strength and chief merit of the foreign system is the security it affords in vesting titles in new registered owners, without requiring a retrospective examination of them. The great weakness of the recording system lies in the facts that there is no recognized authority

38 "Other illustrations of the working of the (Torrens) system may be found in the pages of the law reports. Take the case of the attempted sale of the Savernake estate. This sale gave rise to five or six distinct lawsuits, one of which went to the House of Lords, and after several years of litigation, the purchaser (an extremely willing purchaser) threw up his contract because he despaired of getting a good title. It would be interesting to know how many thousands of pounds were wasted over this abortive sale. The case of *Scott v. Alvarez* (1895) 1 Ch. 596; 2 Ch. 603, is even more instructive, because it shows the risks to which a purchaser of land may be exposed under the present system. In that case the sale gave rise to two distinct lawsuits, both of which went to the Court of Appeal. The contract of sale had been carefully framed by the vendor in order to prevent the purchaser from discovering a fatal defect in

the title, and in the first proceedings the trick succeeded, for the Court of Appeal refused to relieve the purchaser. Owing to the skill and pertinacity of his solicitor the defect was discovered, and in the second action the Court of Appeal refused to order specific performance. But the Court allowed the vendor to retain the deposit, apparently as a reward for her ingenuity in attempting to foist a rotten title on the purchaser. The loss incurred by the purchaser in deposit, costs, etc. must have far exceeded the value of the property. I submit that it is not creditable to us, as a business people, that such a case as this should be possible. Cases in which purchasers and mortgagees have actually lost money owing to defective titles, or absence of title, are by no means uncommon. Most of these cases do not come into court, and are known only to the parties themselves." Vol. 24 *Law Quarterly Review* p. 35 (1908).

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which may declare the condition and status of a title, so that a person dealing with it will feel that he need not examine the whole history of it; that when the title has been examined the lawyers for the buyer and the seller may disagree as to the condition of the title; and that it is possible that both lawyers may not have discovered some serious defect in the title. While this is a fair statement, it must not be supposed that the recording system detracts from the natural value of real property, and gives little security to titles. In practice, lawyers do not disagree frequently and seriously about titles, real property passes freely from owners to purchasers all over the country, and ownership of and mortgages on land are favorite forms of investment. However, the lack of an authoritative arbiter on questions of title has brought about the formation of title insurance companies in many of our cities, and if the local company will insure the title the purchaser is usually willing to take it. But it must not be supposed that title insurance is eagerly sought for whenever a company is established in a community. It is a business of slow growth. While it was started in 1876, its great progress has been made within the past ten years. The Real Estate Title Insurance and Trust Company, of Philadelphia, which issued the first policy in 1876, issued but twenty-six policies in the first seven months of its business, and every company which has started into the business has found that it must educate the public in the advantages of its system. No company confines its business to title insurance only. Some title insurance companies are also trust companies, banks, surety companies and makers of abstracts of title. While title insurance policies or guaranteed certificates of title are used extensively in New York, Philadelphia, Boston, Washington, Detroit, Chicago, Colorado Springs, Los Angeles, San Francisco, Seattle and many other places, yet the ordinary methods of the recording system are in use even in most places where title insurance is written. Despite every precaution mistakes may be made under any system of dealing with land. This fact is recognized in the Torrens system by the creation of an indemnity fund by the state, and title insurance by private companies supplies indemnity under the recording system. If the recording system were not practic-

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ally secure as a method of dealing with land, title insurance would not be written for the small premium which is demanded for it.

§ 227. Rapidity in Bringing Land Under the Torrens Acts.

In foreign jurisdictions notice of an application to register land must be given by publication. The length of time for which the notice must be given varies in different states.³⁹ It usually requires from sixty to ninety days after filing of the application to bring the land under the system. Contested applications generally must be referred to a judge or to a court, and such applications take a longer time. Proceedings in registration are not necessarily long, but they scarcely can be said to be rapid. In this country an application to register land is a lawsuit, and, as to rapidity, it stands just as any other lawsuit concerning a land title. Notice of the application may bring defendants actually into court for a vigorous defense and a long contest, though in most cases of voluntary application the title is clear, and no persons are made defendants except unknown owners. The following table concerning applications for registration in Chicago was prepared down to December 31, 1911, and it may be of interest.

Year.	1899	1900	1901	1902	1903	1904	1905	1906
Applications filed during year_	155	151	152	375	411	329	366	240
Of these there were dismissed_	5	5	11	20	27	9	10	2
Of these there were appealed--	2	1	4	9	6	6	4	2
Of these there are still pending----		7	13	18	31	11	29	9

Year.	1906	1907	1908	1909	1910	1911	Total
Applications filed during year-----	240	233	420	552	614	649	4887
Of these there were dismissed-----	2	1	4	6	5	1	108
Of these there were appealed-----	2	2	7	9	9	None	61
Of these there are still pending--	9	11	18	30	44	189	410

§ 228. Rapidity in Dealing With Registered Land. The Torrens system has won its reputation for rapidity in other countries. If we are wrong in our idea of the slow and dignified ways in which dealings in land were conducted in England and its colonies, and on the continent of Europe, under the system of examination of title by solicitors and notaries, no one is to blame except the writers on the laws and customs of those countries. It is interesting to note what has been said

³⁹ Ante § 23 et seq.

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about rapidity of operations under registration laws in foreign countries. Dumas says: "When compared with the practice of countries where conveyancing is still a private business, transfer under the registration system is of wonderful simplicity. Instead of applying to solicitors or to notaries, or to any other sort of business-men who require weeks and months before making the title clear, any man purchasing a registered property can save himself all other trouble than a simple call at the registry, where a few minutes' search in the books shows him what right the vendor is really able to grant. After this the two parties need only agree upon a notary to draw up the contract, which will serve as a document to be produced with the application for registration; and before a week is passed, the notary may have done the work, and this may be signed and entered at once."⁴⁰

In 1896, Sir Charles Fortesque Brickdale, now registrar in London, went on behalf of the English Government to Germany, Austria and Hungary, to study the systems of registration of land titles in those countries. He studied those systems closely, and made many inquiries into the rapidity with which business was conducted under them. Some parts of his report—the only parts touching on the subject of rapidity of transfer—will now be quoted: "Dr. von Winiwarter, who is legal adviser to the British Embassy at Vienna, has a large practice as combined barrister and solicitor. I asked him to tell me how the system of registration of title operated in regard to time, cost, security and general convenience to the legal profession and the public. With regard to time, he said a week or ten days from the drawing up of the contract down to the final completion of everything and return of the documents from the land registry was the usual thing—any longer delay than that would be most exceptional—almost unknown. If special dispatch was required, and there was no unusual complication, the matter could be completed in two or three days, or he had known it accomplished in one. The officials were very obliging in this respect, and would always do their best if told that a matter was really pressing."⁴¹ "Most peo-

⁴⁰ Registering Titles to Land. Chicago.

Jacques Dumas, Callaghan & Co.,

⁴¹ Pages 24 and 25 of his Report.

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ple are content to complete their transactions as soon as the register has been searched and the formal document signed. Some, however, more scrupulous, do not complete until they see the entries made in the register, which is usually a day or two after the documents are left for registration. Sometimes land banks, which are very particular, require the actual mortgage certificate, 'hypotheken brief,' to be delivered to them before they advance the money; these are sometimes not ready for a week or a fortnight. * * * The papers are returned completed from the registry, usually in a week or ten days; but where expedition is required, the officials will give a matter precedence."⁴² "In Austria and Hungary, there is an interval, varying from thirty to sixty days, after the leaving of a document for registration in the office, within which objections may be made to its registration."⁴³ In his general report, he says: "As a general rule ten or fifteen days is the outside time occupied in transactions relating to land, from the first beginning of the negotiations down to final completion of the record in the land register. * * * If expedition is required, a matter can be carried through in three days, and sometimes in one day. "Mortgages to the Land Banks are completed in about three days." In Budapest, Hungary, the banks which are very cautious, do not, as a rule, lend money on the security of a mortgage until the mortgage has been registered and a period of fifteen days, which is allowed for objections, has also elapsed."⁴⁴

§ 229. The Torrens system requires that when anything is done which affects a title, notice of it must be filed in the registry immediately. The record of the title is thus kept down to date in the registry, so that a purchaser may rely on it. From this fact writers on the system in this country assume that a vendor and a purchaser, or a mortgagor and mortgagee may go to the registry and have a new registration made or an entry noted whenever they are ready to close their transaction. It is undoubtedly true that at the present time this may be done in any registry office in this country, but this is because there is so little registered land, not primarily because the reg-

⁴² Page 26 of his Report.

⁴³ Page 16 of his Report.

⁴⁴ Page 26 of his Report.

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ister shows the condition of estates and interests in land. The registrar is also the recorder of deeds and he gives little or no attention to the current work in the Torrens office, the examiners of titles spend an hour or two a day in the work of that office, and the deputy registrar and his assistants, not being burdened with work, are eager to put aside what work they may have in order to demonstrate to members of the public the simplicity and rapidity of the system. But the test of rapidity can be made only when the system is carrying a large part of the conveyancing which is done in a county. The registrar's office is the only place where transfers may be made and where liens may be created. When registered lands are numerous it becomes a busy place, and must be run according to rules and regulations for the transaction and dispatch of public business. Registrations and entries must be made with reference to the order in which instruments are filed for registration, in order that those may be treated fairly who leave or send instruments for that purpose. If personal visits to the office will secure preference in early registrations, many persons will be there to demand their turns in regular order. About seven hundred instruments a day are filed for record in the recorder's office in Chicago. Under the Torrens system many instruments must be filed in the registrar's office, which are not filed in the recorder's office. If the Torrens system were the only method of conveyancing there, it would be impracticable to give each instrument immediate attention, and a routine for conducting the business necessarily would be established. Appointments would be made, where members of the public insisted on being present, escrows would be made of the money to be paid to vendors and mortgagors, and inspections of the register after registrations and entries actually had been made would be insisted on by interested persons. Anyone who understands the way in which business is done in the registry offices in foreign countries must insist that the Torrens system has the quality of rapidity, but he will insist also that this quality has been too highly commended and represented by advocates of the system in this country. In England, under rule 111, instruments must be entered in the register in the order in

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which they are delivered. All instruments delivered by post during the hours in which the office is open for registration⁴⁵ are treated as delivered at the closing of the office on that day, and if delivered between the hours of closing and opening of the office they are treated as delivered at the opening of the office. Under rule 118, when an instrument purporting to be executed by a registered proprietor is delivered for registration, notice of the fact is sent to him at his registered address; and unless the execution is admitted by him prior to that time, the registration is not completed until after the expiration of three clear days from the posting of the notice. All large registry offices have rules for the orderly conduct of business and for the safeguarding of the register, and three or four days are required from the filing of an instrument until the money is paid over and the transaction is closed, except in special cases.

Every lawyer who has practiced in a small community knows that there under the recording system transactions may be begun and closed readily within the business hours of one day. This possibility arises because a few pages of the grantor and grantee indices, of the *lis pendens* record, and of the judgment docket, cover the records of several years. In cities almost every owner of land has an abstract of title to his property. Ninety-five per cent of the abstract business consists in continuing these abstracts from a period within the past seven years. This shows in a rough way that real property is transferred or mortgaged on an average about once in seven years. With the help of a tract index an ordinary continuation may be made in a few hours. This is not possible in all counties when an instrument is filed for record at the time the order for the abstract is given, because some recorders of deeds run their offices more with reference to their own desires and plans than with reference to the convenience and interests of members of the public, who may have some dealing with land. Some recorders work and check their work with abstract companies in taking off original entries of instruments filed for record, but not yet recorded,

⁴⁵ Namely, from 11 to 3. For office is open from 10 to 4. It searching and other business the closes at 2 on Saturdays.

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while others do not permit original instruments filed on one day to be seen by any member of the public until the next day, after they have been indexed. Of course custodians of public records must have a broad discretion in such matters, and perhaps the only permissible comment is that, as instruments are constructive notice from the time they are filed for record, the earliest possible opportunity to inspect them should be given to the public, and that recorders who give the greatest consideration to the public convenience, and lay out their work so as to give rapid service and ample protection to the records, make just as good custodians of records as do those recorders who make protection of records their only primary consideration. While it is easily possible in a city to begin and close up an ordinary transaction within three days, by giving it special attention, still it usually requires four or five days to complete transactions in current order. If all lands in large communities were registered, the Torrens system might or might not prove to be more rapid than this, but no one now may speak definitely on this subject. In every registry office in this country it is possible now to enter each day's transactions in registered land on that day, but we all know that the greater the number of transactions under any system, the more hindrances and delays arise in administering it.

§ 230. Registry Charges in England. In England the vendor of land which is not registered under the Torrens system pays his solicitor for preparing and exhibiting his title to the purchaser and for attending to the business otherwise; the purchaser pays his solicitor for perusing and advising him on the vendor's title, for preparing the conveyance and for seeing to its proper execution. The charge for each solicitor is regulated by law and is the same. Where the property is worth £10,000—about \$50,000—the fee for each solicitor is £70—about \$350—and the total cost to the vendor and the purchaser is £140—about \$700. Under fee order, 1908, in England, the fees for entry of a first proprietor of land are as follows:

Value of Land or Amount of Incumbrance.

Not exceeding £100-----12 s.

Exceeding £100 but not exceeding £325--£1.

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	Fee.
Exceeding £325 but not exceeding £1,000	1s. 6d. for every £25 or part of £25.
Exceeding £1,000 and not exceeding £3,000 -----	£3 for the first £1,000 and 1s. for every £25 over £1,000.
Exceeding £3,000 and not exceeding £10,000 -----	£7 for the first £3,000 and 1s. for every £50 over £3,000.
Exceeding £10,000 -----	£14 for the first £10,000 and 1s. for every £100 over £10,000, up to a maximum of £25 for £32,000.

For registration of charges, incumbrances, transfers of land, and removals from the register 1s. 6d. is charged for each £25 up to £50,000 and 1s. 10d. is charged for each £1,000 over £50,000. Removal of land from the register is only permitted in England in those districts in which registration is not compulsory. In speaking of the fee for removal, it has been said: "With regard to the amount of the fee it may be remarked that, unless it were at least equal to the fee for registering a transfer or charge, there would be a considerable immediate inducement to remove the land from the register on all sales and mortgages."⁴⁶ There are some twenty-seven fees provided for in the administration of the act, ranging from 1s. to £1. The English act provides that "the fee orders relating and incidental to registration of title shall be arranged from time to time so as to produce an annual amount sufficient to discharge the salaries and other expenses, including the annual contribution to the insurance fund, incidental to the workings of the principal act, and this act, and no more."⁴⁷

⁴⁶ Land Transfer Acts, Brickdale and Sheldon, p. 434.

⁴⁷ In a letter dated October 26, 1910, Sir Charles F. Brickdale, Registrar in England, says with re-

gard to fees and expenses: "Salaries and expenses are difficult to appropriate to any one department, as much mutual assistance is given by one department to another. The

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§ 231. Fees in Prussia, Saxony, Austria and Hungary. In Prussia fees are charged under a schedule which went into operation on October 1, 1895, and in Saxony they are charged under the law of November 6, 1890. English values are used in the following schedules of fees in those countries.

LAND REGISTRY FEES.

Value. £	—On Sale—		—On Mortgage—	
	In Prussia.	In Saxony.	In Prussia.	In Saxony.
	£ s. d.	£ s. d.	£ s. d.	£ s. d.
50-----	0 4 9	0 5 0	0 3 5	0 2 0
100-----	0 7 3	0 10 0	0 4 7	0 4 0
500-----	0 18 0	2 5 0	0 12 0	0 17 6
1,000-----	1 10 0	3 15 0	1 1 0	1 12 6
2,000-----	2 12 0	6 5 0	1 18 0	2 12 6
5,000-----	4 5 0	12 10 0	3 15 0	4 7 6
10,000-----	7 10 0	17 10 0	6 15 0	6 17 6
20,000-----	13 10 0	27 10 0	12 15 0	11 17 6
50,000-----	31 10 0	57 10 0	30 15 0	26 17 6
100,000-----	61 10 0	107 10 0	60 15 0	51 17 6

On every sale and every mortgage fees are charged according to this schedule.

In Prussia, one-half the conveyance fees are charged for transmissions and for family transactions of various kinds. There is no fee for inspection of the register, and there are few incidental expenses. In Austria and Hungary, the registry fees are perhaps a little lower than the above schedules. They are levied on a somewhat complicated system, and are not calculated with reference to the cost of the department of registration. The information as to fees in Prussia and Saxony is taken from Reports on Systems of Registrations of Title in Germany and Austria-Hungary, by Charles Fortesque Brickdale. The following information from the same source may be of interest:

—Transactions Registered.—		—Fees Received.—	
Whole of Sax- ony. Population	Dresden only. Population.	Whole of Saxony.	Dresden only.
3,502,000.	290,000.		
1894-----£251,951	£34,302	£175,300	£47,700
1895-----£269,307	£41,449	£197,250	£62,250

From this it appears that the average fee for each transaction in Dresden in 1894 was £1, 8s. (about \$7.00), and in 1895, £1, 10s. (about \$7.50). The trouble is that it is impossible to say what is regarded in this table as a transaction. If the entry or cancellation of a memorial, and such services are regarded as a transaction, the average fees for

share of income and cost for London Torrens work may be apportioned somewhat as follows:

Year	Receipts £	Expenditure £
1907-8	34,073	40,858
1908-9	30,764	36,354
1909-10	37,120	36,106

These figures require some explanation. The expenditure includes all expenses of every kind, not only salaries, but repair of buildings, furniture, light, heat, water, stationery etc., etc., and an annuity of about £9000 a year, cal-

culated to pay off in forty years the capital expenditure of about £200,000 incurred in purchase of this site and erection of permanent buildings on it. The improvement of income during the year 1909-10 was due to a new fee order, intended to make the office pay its expenses, in which it has succeeded; and this in spite of the fact that at present it is, I consider, unduly weighted with (1) the £9000 annuity, and (2) first registration, both of which might fairly be treated as capital expenditure."

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transfers and mortgages are, of course, much too low.

In the Rhine provinces of Prussia there were in 1895 about two hundred and fifty registrars engaged in the work of registration, together with two hundred clerks, and all these received assistance from the copyists of the local courts of registration. Brickdale's Reports, page 57. In 1896 there were thirteen registration offices in the city of Berlin, and in the office in the center of the city the work done in 1895 was as follows:

(1) Separate applications settled by the Richter, 1,705; (2) New owners registered, 202; (3) Subdivisions of estates, 13; (4) Incumbrances, 1,239; (5) Discharges of incumbrances, 605; (6) Communications with the cadaster office, 374.

In a suburban district of the city comprising about 30,000 inhabitants, the work of the office for the years 1894 and 1895 was as follows:

	1894.	1895.
(1) Separate applications settled by the Richter-----	2,526	2,443
(2) New owners registered-----	559	364
(3) Subdivisions of estates-----	398	157
(4) Incumbrances affecting one title-----	1,649	1,400
Incumbrances affecting two or more titles-----	277	318
(5) Discharges of incumbrances-----	747	904
(6) Communications with the cadaster office-----	358	676

The number of persons employed in these offices is not definitely stated, but it seems from the context that there are about twenty persons in each. See Brickdale's Reports, pages 83, 84 and 85.

FEES IN AUSTRALASIA.

§ 232. Victoria. On making application to bring land under the act, the fees, exclusive of advertisements, are as follows:

	£	s.	d.
When the applicant is the original grantee of crown lands, and there are no other transactions-----	0	5	0
When the value of the property does not exceed £150-----	0	10	0
When the value of the property does not exceed £300-----	1	0	0
When the value of the property does not exceed £450-----	1	10	0
When the value of the property does not exceed £600-----	2	0	0
When the value of the property does not exceed £750-----	2	10	0
When the value of the property does not exceed £1,000-----	3	0	0
For each additional £1,000 or fraction up to £10,000-----	0	5	0
For each additional £1,000 or fraction after £10,000-----	0	10	0

Some of the other fees are as follows:

Amending proprietor's certificate of title-----	1	0	0
Rectifying certificates,—each certificate-----	1	0	0
For each certificate of title issued-----	1	0	0
For registering a transmission of a freehold estate-----	1	0	0
For registering a transfer, lease or mortgage, or discharge of mortgage-----	0	10	0

Forty-six other fees are set forth in the schedule, ranging from 8d. to £1, for services to be rendered under the act.

The fees in Tasmania are about the same as those in Victoria, but they are both somewhat larger than those in the other states in Australasia.

FEES IN CANADA.

§ 233. Nova Scotia.

For every application, two dollars.

For every plan filed, twenty-five cents.

For examination of title—reasonable.

Compensation for work and time, not less than two dollars and one-half and not more than fifteen dollars.

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For entering original and duplicate certificate, two dollars.
 Each subsequent certificate, fifty cents.
 For entering judgment, attachment, etc., fifty cents.
 For each mortgage registered, fifty cents.
 For other services, the same fees as are allowed registers of deeds.

§ 234. Ontario.

Item.	Applications for First Entry of Ownership.	Where the title is possess- ory.	Where the title is abso- lute or qualified and the number of instruments required to be examined does not exceed ten.	Where the title is abso- lute or qualified and the number of instruments required to be examined exceeds ten, or is under the Statute of Limita- tions.
		\$ c.	\$ c.	\$ c.
1. Where the value of the property being registered does not exceed \$1,000 -----		2 50	4 00	6 00
Where such value exceeds \$1,000, and does not exceed \$2,000----		3 00	5 00	9 00
Where such value exceeds \$2,000, and does not exceed \$4,000----		4 00	8 00	12 00
Where such value exceeds \$4,000, and does not exceed \$10,000----		5 00	10 00	20 00
Where such value exceeds \$10,000, and does not exceed \$20,000----		6 00	12 00	25 00
Where such value exceeds \$20,000, and does not exceed \$40,000----		7 00	15 00	30 00
Where such value exceeds \$40,000, and does not exceed \$50,000----		8 00	20 00	40 00
Where such value exceeds \$50,000		8 00	20 00	50 00

2. In case two or more distinct properties are embraced in the same application, or where the titles of different pieces are substantially different, the above fees shall be payable as if the registration of such properties had been applied for separately. Where in consequence of the subdivision of a piece of land the amount chargeable would be in the Master's opinion unduly burdensome, he may abate the same to such sum as he deems fair.
3. The above items cover all services in respect of first registration except where oral depositions have to be taken, or notices served upon persons appearing to have adverse claims, or where there is a contest. In these cases the fees provided in respect of such proceedings shall also be charged. The disbursements of the Master for postage, searches, registration of certificates in the registry office, etc., shall likewise be payable by the applicant.

The fees in Canada are all very small, whether for original registration or for dealings with registered land. Evidently, the object is to make the registry self-sustaining and nothing more. Except in the cities of Toronto and Winnipeg, transfers are usually of comparatively cheap properties.

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§ 235. California. Fees in respect of applications and proceedings under them, prior to registration, are the same as in actions in the superior court.

For issuing a certificate of title and a duplicate, one dollar and fifty cents; and for each additional duplicate, fifty cents.

For registering each transfer, with new certificate, one dollar and fifty cents.

For entry of each memorial, one dollar.

For cancellation of each certificate, memorial or charge, twenty-five cents.

For each certificate showing condition of register, one dollar and fifty cents.

The same fees are allowed for other services as are allowed by law to recorders for like services.

§ 236. Colorado. In counties having more than forty thousand population, three dollars, and in all other counties five dollars must be paid by the applicant in full of all clerks' fees and charges in proceedings for registration. The fee to be paid by the defendant or defendants is three dollars. The party requiring publication or service of notice must pay for it. The examiners of titles in each county are to be paid in each case by the applicant such compensation as the judge of the district court shall determine. The fees to be paid to the registrar are as follows:

On all land having an assessed value, exclusive of improvements, of \$1,000 or less, one dollar, and on each \$1,000 additional value, twenty-five cents.

For granting and registering certificates of title, two dollars.

For registering each transfer, with new certificate, three dollars.

When land transferred is held on any trust, condition or limitation, an additional fee of three dollars.

For entry of each memorial, one dollar and fifty cents.

For each additional owner's, mortgagee's or lessee's duplicate certificate, one dollar.

For filing copy of will with letters testamentary, or for filing copy of letters of administration and entering memorial thereof, two dollars and fifty cents.

For cancelling each memorial or charge, fifty cents.

For each certificate showing condition of register, one dollar.

For certified copy of any instrument on file in his office, the same fees allowed to county clerks and recorders for like service.

Such further fees as the court shall determine and establish.

§ 237. Minnesota. On the filing of an application for registration, the applicant must pay to the clerk three dollars in full of his fees on behalf of the applicant. An appearance fee of three dollars must be paid by the defendant or defendants. The publication of notices must be paid for by the person requiring it.

On all land having an assessed value of \$1,000 or less, three dollars; one dollar a thousand for additional value.

For each original and duplicate certificate, two dollars.

For each new certificate, three dollars.

For entry of each memorial on the register and duplicate, one dollar.

For each additional owner's, mortgagee's or lessee's duplicate certificate, two dollars.

For filing copy of will with letters testamentary, or filing copy of letters of administration and entering memorial, two dollars.

For cancelling each memorial or charge, one dollar.

For each certificate showing condition of the register, one dollar.

Such further fees as the court may determine.

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§ 238. **Oregon.** The applicant must advance and pay to the registrar ten dollars, two dollars and a half in full for the registrar up to the granting of the certificate, and seven dollars and a half in full for the examiner, provided that in contested or complicated cases the court may make further allowance to the examiner.

For granting original and duplicate certificate, one dollar.

For each new certificate, fifty cents.

For entry of each memorial on register and duplicate, fifty cents.

For filing copy of will with letters, or copy of letters of administration, twenty-five cents.

For cancellation of each memorial, twenty-five cents.

For any certified copy, the same fees as are allowed to recorders of deeds.

The docket fee for filing an application, and the appearance fee of the defendant are five dollars each.

§ 239. **New York.**

Filing application, one dollar and a half.

Entering and filing each order of service or summons, seventy-five cents.

Entering and filing order appointing guardian ad litem, seventy-five cents.

Entering, filing and indexing judgment, five dollars.

Entering, filing and indexing any lien or incumbrance, one dollar.

For each new certificate, two dollars.

Satisfaction of any lien, fifty cents.

Entering a caution, one dollar.

For filing an application, the same fees as in any civil proceeding.

§ 240. **Massachusetts.** Some of the fees are as follows:

For every application to bring land under the act, three dollars.

For every plan filed, seventy-five cents.

For examining title, five dollars, and one-tenth of one per cent of the value of the land.

For each notice by mail, twenty-five cents, and the actual cost of printing.

For entry of order dismissing an application, one dollar.

For copy of decree of registration, one dollar.

For entry of original certificate of title and issuing one duplicate, three dollars.

For all services by a sheriff under the act, the same fees as are now provided by law for like services.

For registration of every instrument and attesting the registration, one dollar and fifty cents.

For filing and registering an adverse claim, three dollars.

Fourteen other fees are provided for in the schedule, and this clause is added: "In all cases not expressly provided for by law, the fees of all public officers for any official duty or service, under this act shall be at the same rate as those prescribed herein for like service."

§ 241. **Hawaii and Philippine Islands.** The fees are substantially the same as in Massachusetts. In Hawaii, for examining title the fee is ten dollars and one-twentieth of one per cent. of the value of the land.

§ 242. **Washington.** On filing an application in counties having more than forty thousand population, three dollars must be paid to the clerk for his fees, and in all other counties, five dollars. The defendant's fee is three dollars. Each party must pay for his own notices. On all land having an assessed value, exclusive of improvements, of \$1,000 or less, \$1.00 must be paid to the registrar. Twenty-five cents must be paid for each \$1,000 additional value.

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For each original certificate and duplicate, two dollars.

For each certificate on transfer, three dollars.

Where land is held in trust, on condition, or with limitation, three dollars.

For each memorial on the register, one dollar and a half.

For additional owner's, mortgagee's or lessee's duplicate certificate, one dollar.

For filing copy of will with letters, or letters of administration and entering memorial, two dollars and a half.

For certified copies, the same fees allowed by law to county clerks.

Such other fees as the court may prescribe.

§ 243. Illinois. The docket fee to be paid to the clerk on filing the application, is five dollars, and the appearance fee of the defendant is five dollars. The applicant is required to pay fifteen dollars to the registrar in full of his services and those of the examiner up to the granting of the certificate of title. In proper cases the court may direct the payment of further fees by the applicant or by any defendant. When the application includes titles derived from more than one source, an additional sum of five dollars for each source must be advanced. The other fees are as follows:

For granting and registering certificate of title, two dollars.

For each transfer, with new certificate, three dollars.

For entry of each memorial on the register, three dollars.

For filing copy of a will with letters testamentary, or filing copy of letters of administration and entering memorial thereof, five dollars.

For cancelling each memorial or charge, one dollar.

For each certificate showing condition of the register, one dollar.

The same fees are allowed for other services as are allowed by law to recorders for like services.

§ 244. Fees in Original Registration in this Country. From the foregoing schedules it is evident that in some state in this country the fees are as much for original registration of a small homestead or a cheap lot as for registration of the most valuable piece of property in the state, but in some states the charge for original registration is graduated according to the value of the property. The use of a charge or premium, graduated in proportion to the value of the property, is the logical and natural basis of insurance, and since there is an indemnity feature in the Torrens system, it is appropriate to use a graduated scale of fees in original registration. The docket fee in full of clerk's costs is small in every state, and in Chicago it is just one-half the fee in all other cases. Witness fees and the cost of documentary evidence are generally the same in Torrens applications as in other proceedings in court. In Illinois in Torrens cases, but not in other cases, any abstract of title or certified copy thereof, made in the ordinary course of business by makers of abstracts, may be received in evidence, and is prima facie evidence of title as set forth

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therein.⁴⁸ An applicant for registration of a title is unable to determine in advance what the proceeding will cost him. If it is not contested in Illinois, the fees are about \$25.00 or \$26.00, as a general rule, with the contribution to the indemnity fund added, \$1.00 for each \$1,000.00 in value. In litigated cases costs sometimes run quite high. In one case it was held that an allowance of \$100 to each of two examiners is not an abuse of the discretion conferred on the court by a Torrens act, where the report of the first examiner was set aside and where the record in the case consisted of seven hundred and ten pages. Stenographers' fees, witness fees, fees for certified copies, etc., etc., were paid also.⁴⁹

§ 245. Fees in Dealing with Registered Land in this Country. The price charged for a service is one thing, and the cost of the service is quite another thing. A consideration of the schedules of fees for dealing with registered land in this country will show clearly that they are not formed with a view to the relation between the cost of the service and the price charged. The fee for each service is fixed quite arbitrarily, and under one schedule it is one sum and under another it is another sum. Doubtless the lack of basis in these charges will be overcome ultimately. Space, light, heat, office furniture and office equipment are furnished usually at public expense from general taxes and do not appear as expenses of the system. An item of expense which does not appear directly on the face of the schedules is the cost of certified copies of all court appointments, orders, decrees and judgments, which must be procured and filed with registrars. Many suits affecting lands must be abstracted to show the cause of action, the service of process, the proper parties to the action, the answers of defendants, as well as the terms of the decree or judgment of the court. When the system is in its early stages the original files in cases may be used by examiners of title, but after the system has become firmly established and many lots of land have been registered, general rules as to abstracts of suits will be made. This may become necessary in order to protect the indemnity fund from errors made by the registrar

⁴⁸ Amendment to Illinois act, 1907.

⁴⁹ Wells v. Messenger, 249 Ill 72; 94 N. E. Rep. 87 (1911).

in registering titles under court proceedings. When the whole plan of dealing with the register is fully considered, the expense of dealing with registered land is not as light as it may seem at first impression, but while the cost of such dealing is apt to be under-estimated in a general view of the subject, it cannot be said that the system is expensive. In establishing any new public project, fees are made small, but afterward they are raised in order to meet the requirements of the office. In some states a new contribution must be made to the indemnity fund, when registered land descends to heirs.

§ 246. Necessity for Services of a Lawyer. One of the original objects of the Torrens system was to establish a register, within the four corners of which should be contained everything relating to the title in question, and to have noted on the register such entries and memoranda as any intelligent man could understand, so that the system could be carried into practical effect without the intervention of persons skilled in the law.⁵⁰ When the Torrens acts first were passed in Australia and England, many lawyers in those countries were hostile to them and opposed the system as unworkable. Their criticisms were the basis for many amendments to the statutes. When the system finally was made consistent and workable, it was acknowledged that their objections to the original acts were well founded. No one now blames the solicitors in England who opposed registration under Lord Westbury's act of 1862, or Lord Cairn's act of 1875, because it is admitted that the workings under those acts were very defective and unsatisfactory, and that they did not possess such qualities as entitled them to the support of practical lawyers.⁵¹ The accusations of self interest, which were made against solicitors a few years ago, are now considered "a calumny invented by the authors and abettors of a bad piece of legislation, with a view to find a plausible excuse for its failure."⁵² In Australia it was supposed at first that the Torrens acts did away with all trusts, conditions and limitations in lands, and that they swept

⁵⁰ *Fels v. Knowles*, 26 N. Z. L. R. 604 (1906).

⁵¹ *Transfer of Land by Registration of Title*, Dill, p. 32. *Regis-*

tration of Title to Land, Brickdale, pp. 55, 56.

⁵² *Registration of Title to Land*, Brickdale, p. 54.

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away all the laws which had governed lands for generations, leaving nothing to be dealt with except absolute and unconditional titles under an arbitrary, radical and unknown set of formulary laws. Lawyers expressed themselves pointedly against the wisdom and practicability of such an experiment and prophesied dismal failure for it. But the courts held that the system applied to methods of conveyancing, and that it did not alter greatly the laws with respect to titles. Lawyers saw that as a system of conveyancing it was a great improvement on the old English methods which had come down to them as a heritage, and vigorous opposition gradually ceased. The opposition of lawyers to the adoption of the Torrens system in England and Australasia has not been understood, properly or generally, and whenever it is proposed to adopt that system in any state, it is assumed that lawyers are hostile to it, and that the reason for their hostility is that their services are not required under it. Men in any profession or business are opposed to radical changes which they do not understand, but it is a mistake to suppose that the services of lawyers are not required in dealing with registered land. They are the conveyancers of land in this country, and the same forms of instruments are used under the Torrens and the recording systems. The register shows entries of mortgages, leases, judgments, attachments, conditions, limitations and restrictions, but an examination must be made into the details of all these matters. It is a well established custom everywhere that vendors and purchasers, mortgagees and chargees employ lawyers to look after their interests in land, whether it is registered or unregistered. Abstract makers know very well that they do not furnish abstracts of title for every transaction made in real estate. Friends, relatives and neighbors deal with each other without an inspection of the records. Occasional dealings may be made under the Torrens system without the services of a lawyer, especially when the system is new in a community, and when the officers and clerks in the registry office are anxious to render all the service possible to patrons of the system. Tax and special assessment searches on the property in question may be furnished by such officers and clerks without charge, and advice

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and assistance may be given freely by them to the parties. This custom arises naturally in the pioneer days of the system, but ceases just as naturally when the system is carrying a large part of the lands in a community. Whatever the fact may be in other places, in Australia and in this country, lawyers obtain the same fees for superintending the transfer or mortgaging of land, whether registered or unregistered. They charge for procuring and filing certified copies of proceedings of courts, just as they do for attending the hearings of motions in court. So long as owners of real property have freedom to contract concerning their titles, it will be necessary to employ men of special learning in the law to superintend the conveyance of land, and any system which attempts to make every man his own lawyer will bring loss to many of those who use it. Ever since civilization brought about the enactment of laws, men have dreamed about the abolition of the lawyer from the affairs of men and states, but economically and practically he has been found to be necessary. If we are to make dealings with titles so simple that any person of fair intelligence and education may deal with them without legal advice and direction, we must not found them on such records and registers of title as we now use. We must not expect laymen to understand acts of legislatures, containing one hundred or more sections, and dealing with technical principles of conveying land. Knowledge and experience are necessary still in dealing with land, whether registered or unregistered.

§ 247. In Berlin, a notary is usually employed in every transaction. In the towns and villages of Prussia, many persons with the assistance of the clerks in the offices, attend to their own transactions, which are usually very small, though a notary is usually called in.⁵³ Where the notary has entire charge of the conduct of the proceedings, his fee, which is regulated by law, is the same as the land registry fees; and in order to find the total cost, including notary's fees, the schedule of fees in Prussia, given on a preceding page, only needs to be doubled. In Germany, the vendor pays his lawyer for

⁵³ Brickdale's Reports on the Systems of Registration of Title in Germany and Austria-Hungary, p. 25.

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attending to the business for him, and the purchaser pays his lawyer and the registry fee. The following is the schedule of such charges in Prussia. The seller pays the fees in the third column, and the purchaser pays the fees in the fourth column. These fees are to be paid in every transfer of land. The English values are used.⁵⁴

Value.	Registry Fees.			Professional Help When			Purchaser's		
				Required by Seller.			Costs.		
£	£	s.	d.	£	s.	d.	£	s.	d.
500	0	18	0	0	18	0	1	16	0
1,000	1	10	0	1	10	0	3	0	0
10,000	7	10	0	7	10	0	15	0	0
50,000	31	10	0	31	10	0	63	0	0
100,000	61	10	0	61	10	0	123	0	0

Brickdale says: "In Austria and Hungary there is no fixed tariff of professional charges, but I was told by lawyers in good practice in both countries that their charges are not at all serious. In Vienna about £1 is a very usual fee for the purchaser's lawyer for investigating the register, drawing the deed and attending to completion and registration. Ten pounds is a high fee, even in large matters, and with wealthy clients. * * * One of the judges with whom I conversed rather complained of a case of his own where the value had been 50,000 fl., about £4,176, in which the professional charges had amounted to 80 fl.—£6 12s. 6d., a side."⁵⁵

In a recent report it is said:⁵⁶ "We are satisfied that the claim sometimes made for registration of title, that the layman can in the general case dispense altogether with external aid, has been much exaggerated. * * * Mr. Pollock of the London Registry cited some striking reports from various Colonial governors in support of his statement that 'in the Colonies a great deal of business is done without the intervention of solicitors.' But Mr. Hogg, the only witness with personal experience of Australia, tells us that it is not so there—that even business men in the capitals where the registry is, bankers, loan and investment companies, etc., do not do their own work without professional assistance; and Dr. Mur-

⁵⁴ Brickdale's Reports, p. 22.

⁵⁵ Brickdale's Reports, pp. 3, 25.

⁵⁶ Reports by the Royal Commission on Registration of Title in Scotland, presented to both houses

of Parliament by command of His Majesty, 1910, in which a system of registration of title was recommended for Scotland, p. 12.

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ray says, 'In the hundreds of cases in New Zealand and Australia which have passed through my hands, a solicitor there has always been employed,'—and he speaks of agents having to examine the filed deeds at the registry as a matter within his personal knowledge. It is not possible to say to what extent agents would still be employed in such matters if registration of title were established in this country (Scotland). We think it probable that upon grounds of public convenience the business of land transfer would still be a specialized matter in the hands of a class who made it their business. But we cannot doubt that if a register of title were once established which showed conclusively and distinctly all that now forms the subject of solicitors' and searchers' investigation, the searcher's labour would be abolished, and that of the solicitor would be greatly diminished, and the expense correspondingly reduced. In short, we think that the cost of working the new system, once it were established, would be less than the cost of the present one as it now stands, in the case of simple transmissions where the subject changes hands without added condition or restriction." Brickdale says: "In England professional help on both sides is practically a necessity always."⁵⁷ This necessity will arise everywhere until laymen know as much as the lawyers know about the one hundred or more sections of the Torrens acts and the judicial decisions rendered under them, and about leases, mortgages, conditions, restrictions, limitations and forfeitures which must be examined off the register.

In general ad valorem scales of solicitor's costs are not in operation in Australasia.⁵⁸ In South Australia and Fiji special ad valorem scales for transactions with land on the Torrens register have been prescribed. The following table shows the expense of carrying out some ordinary transactions with land on the Torrens register in Australasia:⁵⁹

⁵⁷ Foot note on page 22 of his report.

⁵⁸ See Hogg, *Australian Torrens System*, pp. 414, 703.

⁵⁹ See page 213 of *Minutes of Evidence before Royal Commission on Registration of Title in Scotland*, evidence of James Edward Hogg, the author, as to cost of registration in Australasia.

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Original Registration New South Wales	Registry Fees	Incidental Expenses	Solicitor's Costs
¹ Value of land £1000. Title simple, no complication, title deeds presented.	Assurance fund £ s d 2 1 8 Certificate of title 1 0 0 Advertisements 1 10 0 <u>£4 11 8</u> In some states as in Tasmania and Victoria additional advalorem fee of from 5s to £5 is payable.	Stamp duty £ s d 1 0 0 Map and plan prepared by surveyor 2 2 0 <u>£3 2 0</u>	£ s d Say 4 4 0 <u>£4 4 0</u> Incidental expenses 3 2 0 Registry fees 4 11 8 <u>Total expenses £11 17 8</u>

Nature of Transaction	Registry Fees	Solicitors' Costs
² Transfer of land on sale for £500; vendor registered as proprietor, land in one certificate. No plan required.	Searches and registering transfer £ s d 0 14 0 £ s d	£ s d Say 2 2 0 £ 2 2 2 Registry fees 0 14 0 Total £2 16 0
³ Mortgage for £500.	As above 0 14 0	£ s d Say 3 3 0 Registry fees 0 14 0 <u>£3 17 0</u>

⁴ Transfer on sale for £20,000; purchaser paying his own solicitor; land purchased consisting of portions of land comprised in twelve certificates of title; one new certificate to comprise land purchased.	£ s d Searches 0 10 0 Registering transfer 0 10 0 Cancellation of twelve certificates 2 8 0 New certificate 1 0 0 Extra diagrams 0 5 0 <u>£4 13 0</u>	£ s d Say 15 15 0 Registry fees 4 13 0 Map by surveyor 10 10 0 <u>Total 30 18 0</u>
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Vendor pays his own solicitor, say £ s d 5 5 0	Vendor pays for one certificate for unsold land £ s d 1 5 0	
Mortgage by purchaser for £12,000 as above, mortgagee's expenses paid by purchaser to mortgagee's solicitor.	Registering mortgage 0 10 0 Twelve extra certificates 1 4 0 £1 14 0	£ s d Say 15 15 0 Registry fees 1 14 0 £16 19 0

Cost of Original Registration in England.⁶⁰

Value of Property	Registry Fees	Solicitor's Fees.
£100	12s	A solicitor is usually employed. The fees vary according to the work done. As a rule they would be from £2 2s to £5, 5s. In very small cases they might be less.
£300	£1	
£1,000	£3	
£3,000	£7	
£10,000	£14	
£20,000	£19	

Cost of Transfer of Registered Land in England.

Value of Property	Registry Fees	Vendor's solicitor where no title outside the register is investigated	Purchaser's Solicitor
£100 or less	1s 6d for each £25 in value	£1. 11 6	Same scale and regulations as vendor's solicitor.
£300	18s	£5. 5	
£1,000	£3	£6. 6	
£3,000	£9	£10. 10	
£10,000	£30	£15. 15	
£20,000	£60		

⁶⁰ These tables were made by Hugh Pollock, Esq., Deputy Registrar in London. In his testimony before the Royal Commission on the Land

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Transfer Acts, Answers 2159—2162 and the discussion which follows, he said that vendors and purchasers usually employ solicitors, but that it is not necessary for them to do so on all occasions. He now writes "I have now to modify what I then said as the new land taxation, imposed by the Finance (1909-1910) Act 1910, makes it more difficult for parties to act without solicitors." Letter dated Nov. 29, 1911.

Cost of Registering a Mortgage on Registered Land in England.

Amount of Loan	Registry Fees	A Solicitor is usually employed by the lender. His fees are:	A Solicitor is usually employed by the borrower. His fees are:
		For £100 to £300 fees £3.3 to £5.5	For £100 to £300 fee £2. 2s
£100 or less	1s. 6d. for each £25 of loan		
£300	18s.		
£1,000	£3	£5. 5s	£5. 5s
£3,000	£9	£6. 6s	£6. 6s
£10,000	£30	£10. 10s	£10. 10s

This table was also made by Mr. Pollock. In regard to the solicitors' fees he says in his letter of Nov. 29, 1911: "In course of time, when the system is more widely extended and better understood, solicitors will not be employed so generally. Private lenders probably will almost invariably have to employ them, and I anticipate that the result will be that most of the lending on mortgage will be by companies which will have a staff competent to carry through the whole transaction, without outside legal assistance. The new land taxation will not interfere with this as it will with sales."

§ 248. Fees For Title Insurance. In order to compare the cost of conveyancing under the Torrens system in England with the cost of title insurance by private companies in this country, the fees charged in Chicago are given below. It must be understood that in Chicago the schedule of fees for title insurance covers the attorney's fee for examining the title and also the charge for ordinary services in examining and abstracting the title shown by the records. Where an extraordinary amount of abstract work is necessary in order to present the record title, as, for instance, where some court proceeding must be abstracted, or where the abstract of title has not been brought down for some years and many intervening dealings with the land are to be abstracted, an extra charge is made to cover such expense; but in all ordinary cases the schedule of premiums for the first policies issued on titles is as follows:

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Value of Property.				Mortgage Policies.	Owners' Policies.
	\$	500 or less		\$ 15	\$ 20
Over		500 to include	\$ 600	16	22
"		600 "	700	17	24
"		700 "	800	18	26
"		800 "	900	19	28
"		900 "	1,000	20	30
"	1,000	"	2,000	24	35
"	2,000	"	3,000	28	40
"	3,000	"	4,000	32	45
"	4,000	"	5,000	35	50
"	5,000	"	6,000	38	55
"	6,000	"	7,000	41	60
"	7,000	"	8,000	44	65
"	8,000	"	9,000	47	70
"	9,000	"	10,000	50	75
	15,000			60	90
	20,000			70	105
	25,000			90	120
	50,000			130	195
	100,000			230	345

The charge for each additional thousand dollars, or fraction thereof, over and above \$10,000, is \$2.50 for mortgage policies and \$3 for owners' policies. A discount of 10 per cent is given for prompt payment on all bills for title insurance. On a sale of land, the title to which has not been insured, it is customary for the purchaser to stipulate as a part of the contract that the vendor shall procure a fee or owners' policy insuring the title. The premiums for such insurance are set forth in the third column of the above table. It occasionally happens that an owner, who is thinking of selling a lot or piece of land, procures a policy in order to be assured that he can deal with the land quickly when he has contracted to sell. An owner, having a fee or owners' policy, may give a mortgage on the land, and for \$6.50 procure a mortgage policy for the same, or any less amount. This charge of \$6.50 is a minimum fee, and applies when the mortgage is the only instrument which appears on the record of the title after the date of the fee policy. A charge of \$1.50 is made for abstracting and passing on each additional intervening instrument shown in the abstract after that date. A mortgage policy guarantees to the

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owner of the indebtedness that the mortgage has been executed by the proper person in the proper manner, and that there are no defects in or incumbrances on the title prior to his mortgage, except such as are set forth in the policy. This policy is in full force until the debt is paid. When a mortgage policy is thus procured under an owners' policy, the owners' policy is endorsed with a provision that it shall be reduced in the amount at any time due on the mortgage, and that when the mortgage is fully paid it shall be in force for the full original amount named in it. Where the owner of land transfers it and surrenders his title policy, and nothing appears on the records except his deed of conveyance, the purchaser for a fee of \$6.50 may obtain a policy in his own name for the same amount as the one surrendered. A charge of \$1.50 is made for each additional instrument which is disclosed by the records. If the purchaser is satisfied to take the policy showing the title of his vendor at its date, it may be assigned to him by his vendor without any expense whatever. Most persons who make loans on real estate, or who buy loans from real estate agents, require with each loan a mortgage policy of title insurance, in order that they may be secured against any defective title, and against any expense in case of litigation affecting the title. An owner who is mortgaging his land, and who has no title policy covering it, may take an owners' policy in his own name for the value of the land, but subject to the mortgage. For this he pays the appropriate fee indicated in the third column of the last table. For an additional fee of \$2.50 he may at the same time procure a mortgagee's policy for the amount of the mortgage, and his owners' policy will be endorsed as just indicated. He may, however, procure for the owner of the indebtedness a mortgage policy only, and in that case he pays the appropriate fee set out in the second column of the last table. While this mortgage policy has no force after the debt described in it is paid, the owner of the land, who procured it, is given credit, in any further insurance which he may take out on the title, for one-half of the first premium paid by him, and any purchaser of the land is given credit for one-fourth of that premium. This credit is given for the reason that the insuring company has examined the title down

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to the date of the mortgage policy, and has no occasion to make any examination of it prior to that date.

§ 249. From the tables set out in the two preceding sections it is possible to compare the cost of original registration with original title insurance, and to compare the cost of transferring registered land with the cost of transferring land under a title insurance policy. Since the object of title registration is to deal with registered land, let us figure on the cost of ten transfers.

In Australia.

Value	Original Registra- tion	Ten Trans- fers	Total
\$5,000	\$52.50 excluding stamp duty	\$140.00 including solicitor's fees	\$192.50

In England.

Value	Original Registra- tion	Ten Trans- fers	Total
\$5,000	\$25.00 including minimum solicitors' fees.	\$150.00 excluding all solici- tor's fees.	\$165.00

In Chicago.

Value	Original Title Insur- ance fees	Ten Trans- fers	Recording and Convey- ancing	Total
\$5,000	\$55.00	\$65.00	\$10.00 for cording ten deeds and \$20.00 for preparing ten deeds	\$150.00 Less 10 per cent for cash.

If solicitors' fees are to be computed, according to the statements of all the foreign authorities on the subject, title insurance, as carried on in this country, is much the cheapest method of dealing with land.

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§ 250. Concerning Simplicity, Security, Rapidity and Cost.

The cost of conveyancing was onerous in England and Australasia under the old system of conveyancing, and the reputation for cheapness, which the Torrens system has acquired, was earned principally in those countries. Nevertheless, it is undoubtedly true that this system is cheaper in the long run than the system of procuring an abstract of title to land and having it examined by a lawyer on each dealing with the land. In small communities the latter system is still inexpensive, but in large communities it has become expensive and unscientific enough to attract attention. It may be said with confidence that neither the Torrens system nor the recording system is so complex, insecure, slow or costly as to depreciate the natural value of land. Each system possesses, perhaps with some varying degrees, all the necessary elements of a practical and successful method of conveying and dealing with land. In the present state of our constitutional law, the Torrens system in this country can never produce what it purports to effect, namely, a conclusive certificate of an indefeasible title in the registered owner, and can never be made so simple and secure as the foreign systems. The natural and logical effect of our laws is the development of title insurance, a guaranteed certificate of title, and not the development of a certificate of ownership of an indefeasible title to land, issued by the state. Such is the opinion of many thoughtful persons who are equipped to judge of such matters. But the progress of the Torrens system in this country is not to be impeded by mere adverse opinion as to its adaptability to our laws. A large part of the people in several states desire to have it tried, and the trial is now on. It is useless for its advocates to gain little advantages for it from state legislatures, and it is equally useless for its opponents to throw obstacles in its way. This trial is to be a fair one, it is to be conducted patiently and slowly, and it will not be concluded until the success or failure of the system is demonstrated.

APPENDIX.

Original Torrens Act.

Anno Vicesimo Primo.

VICTORIÆ REGINÆ.

South Australia Act No. 15.

An Act to simplify the Laws relating to the transfer and encumbrance of freehold and other interests in Land.

Assented to, 27th January, 1858.

WHEREAS the inhabitants of the Province of South Australia are subjected to losses, heavy costs, and much perplexity, by reason that the laws relating to the transfer and encumbrance of freehold and other interests in land are complex, cumbrous, and unsuited to the requirements of the said inhabitants, it is therefore expedient to amend the said laws—Be it Enacted, by the Governor-in-Chief, of the said Province, with the advice and consent of the Legislative Council and House of Assembly of the said Province, in this present Parliament assembled, as follows:

1. All Laws, Statutes, Acts, Ordinances, rules, regulations, and practice whatsoever, relating to freehold and other interests in land, so far as inconsistent with the provisions of this Act are hereby repealed so far as regards their application to land under the provisions of this Act, or the bringing of land under the operation of this Act.

2. This Act may be cited for all purposes as the “Real Property Act.”

3. In the construction, and for the purposes of this Act, and in all instruments purporting to be made or executed thereunder (if not inconsistent with the context and subject matter), the following terms shall have the respective meanings hereinafter assigned to them, that is to say—

The word “Land” shall extend to and include messuages, tenements, and hereditaments, corporeal and incorporeal, of every kind and description, (whether of a greater or less de-

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scription than life estates, and whether at law or in equity), together with all paths, passages, ways, waters, water-courses, liberties, privileges, easements, plantations, gardens, mines, minerals, and quarries, and all trees and timber thereon or thereunder, lying or being, unless the same are specially excepted:

“Grant” shall mean the land grant of any land of the Crown by any Resident Commissioner or Governor of the said Province, to any person or persons:

“Proprietor” shall mean any person seised or possessed of any estate at law or in equity, in possession, in futurity, or expectancy, whether a life estate, or of a greater or less description than a life estate, in any land.

“Transfer” shall mean the execution of every instrument, and the performance of every formality, including registration, required by this Act, to give validity to the passing, either of the whole of the proprietor’s interest in land, or of any less estate therein:

“Memorandum of Sale” shall mean the instrument executed by the person having estate or interest in land under the operation of this Act, for the purpose of transferring such estate and interest in form of the schedule hereto annexed, marked B:

“Transmission” shall mean the acquirement of title to or interest in lands, consequent on the will, intestacy, bankruptcy, insolvency, or marriage of a proprietor:

“Certificate of Title” shall mean the instrument executed by the Registrar-General, in form A of the Schedule hereto annexed, duplicate of which constitutes a separate page in the register book, vesting the fee simple, or any less estate (as the case may be), in land brought under the operation of this Act:

“Mortgage” shall be applicable to every charge on, or interest in land, created merely for securing a loan:

“Mortgagor” shall mean the borrower of money on the security of any estate or interest in land under the operation of this Act:

“Mortgagee” shall mean the lender of money upon the security of any estate or interest in land under the operation of this Act:

“Bill of Mortgage” shall mean the instrument in form of the Schedule hereto annexed, marked D, required under this Act to be executed by the intending mortgagor, with a view to creating such mortgage as last aforesaid:

“Encumbrance” and “Assignment” shall mean the execution by a person of every necessary or suitable instrument and the performance of every formality, including registration, required by this Act, for assigning, surrendering, or otherwise

ORIGINAL TORRENS ACT

transferring land of which such person is possessed, either for the whole estate of the person so possessed, or for any less estate, in order to render such land available for securing the payment of any annuity or dower, or for the payment of any sum of money either absolutely or subject to conditions, restrictions, or contingencies; including also the execution, by the Registrar-General, of every instrument, and the performance by him of every formality required by this Act to give validity to such encumbrance or assignment:

“Encumbrancer” shall mean the person, not being a mortgagor, who shall have assigned any estate or interest in land under the operation of this Act for the purpose of securing any annuity, dower, or sum of money:

“Encumbrancee” shall mean the person, not being a mortgagee, to whom or for whose benefit any estate or interest in land under the provisions of this Act shall have been encumbered or assigned:

“Bill of Encumbrance” or “Bill of Trust” shall mean the instrument creating such encumbrance or assignment executed by the person having estate or interest in land under the operation of this Act in form of one or other of the Schedules hereto annexed, marked respectively E or F:

“Estate in Fee Simple” shall mean the absolute property in land, such as is originally vested by a “Grant” in the meaning of this Act:

“Registration Abstract” shall mean the instrument under the hand and seal of the Registrar-General, executed in form of the Schedule hereto marked H, or in words to the like effect, available in lieu of the Register Book, for the purpose of enabling a person to mortgage or to sell, in places without the limits of the said Province, land under the operation of this Act whereof he may be seised as proprietor:

“Lunatic” shall mean any person who shall have been found to be a lunatic upon inquiry by the Supreme Court, or by any Judge thereof, or upon a Commission of Inquiry issuing out of the Supreme Court in the nature of a writ de lunatico inquirendo:

The expression “Person of Unsound Mind” shall mean any person not an infant, who, not having been found to be a lunatic, shall be incapable, from infirmity of mind, to manage his own affairs:

“Consular Officer” shall include Consul-General, Consul, and Vice-Consul, and any person for the time being discharging the duties of Consul-General, Consul, or Vice-Consul:

“Registrar-General” shall mean the Registrar-General or other officer duly authorized or appointed to carry out the pro-

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visions of this Act, or any person duly authorized as Deputy of such Registrar-General, or to act on his behalf in respect of this Act:

“Instrument” shall mean and include any land grant, certificate of title, or other document in writing, relating to the transfer, encumbrance, or other dealing with land:

“Register Book” shall mean the book hereinafter directed to be kept for the purpose of recording therein, in order, grants and certificates of titles issued, and the execution of instruments affecting land under the operation of this Act:

“Person” used and referred to in the masculine gender, shall include a female as well as a male, and shall include a body corporate:

The naming of any person as proprietor, vendor, mortgagor, mortgagee, encumbrancer, encumbrancee, lessor or lessee, or as trustee, or as seised of or having any estate or interest in any land, shall be deemed to include the heirs, executors, administrators, and assigns of such person:

And, generally, unless the contrary shall appear from the context, every word importing the singular number only shall extend to several persons or things, and every word importing the plural number shall apply to one person or thing, and every word importing the masculine gender only shall extend to a female.

4. The department of the Registrar-General shall be the department to undertake the general superintendence of matters relating to the transfer, transmission, sale, mortgage, and encumbrancing of all land under the operation of this Act, and the releasing of such land from any mortgage or encumbrance and shall be authorized to carry into execution the provisions of this Act, and of any Acts to amend or extend the provisions of this Act in force for the time being.

5. All documents whether purporting to be issued or written by or under the directions of the Registrar-General, and purporting either to be sealed with his seal or signed by him, or by one of his deputies shall be received in evidence, and shall be deemed to be issued or written by or under the direction of the Registrar-General without further proof unless the contrary be shown.

6. The Registrar-General may, with the consent of the Governor, for the purposes of carrying into effect the provisions contained in this Act, give such instructions as to the manner of making entries in the register book, as to the execution and attestation of instruments as to any evidence to be required for indentifying any person, and generally as to any act or thing to be done in pursuance of this Act, as he may think fit.

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7. The Registrar-General may, with the consent of the Governor of the said Province from time to time prepare and sanction forms of the various books, instruments, and papers required by this Act, and may with like sanction from time to time make such alterations therein as he deems requisite; and shall, before finally issuing or altering any such form, give such public notice thereof as he deems necessary in order to prevent inconvenience; and shall cause every such form to be sealed with such seal as aforesaid, or marked with some other distinguishing mark, and to be supplied at the General Registry Office free of charge, or at such moderate prices as he may from time to time fix, or may license any person to print and sell the same; and every such instrument and paper as aforesaid shall be made in the form issued by the Registrar-General, and sanctioned by him as the proper form for the time being; and every such instrument or paper, if made in a form purporting to be a proper form, and to be sealed or marked as aforesaid, shall be taken to be made in the form hereby required, unless the contrary is proved.

8. Every person who counterfeits, assists in counterfeiting, or procures to be counterfeited, such seal or other distinguishing mark as aforesaid, or who fraudulently alters, assists in fraudulently altering, or procures to be fraudulently altered any form issued by the Registrar-General with the view of evading any of the provisions of this Act or any condition contained in such form, shall for each offense be deemed guilty of a misdemeanor, and shall incur a penalty not exceeding One Hundred Pounds; or may, at the discretion of the Court before whom such case may be tried, be imprisoned for any period not exceeding twelve calendar months; and every person who, in any case in which a form sanctioned by the Registrar-General is by this Act required to be used, uses without reasonable excuse any form not purporting to be so sanctioned, or who prints, sells, or uses any document purporting to be a form so sanctioned knowing the same not to be so sanctioned for the time being, or not to have been prepared and issued by the Registrar-General, shall for each such offense incur a penalty not exceeding Ten Pounds.

9. The Registrar-General may exercise the following powers, that is to say:—

(1) He may require the proprietor or other person making application to have any land brought under the operation of this Act, or the proprietor, or mortgagee, or other person interested in any land under the operation of this Act, in respect of which any transfer, lease, mortgage, or other encumbrance, or any release from any mortgage or encumbrance,

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is about to be transacted, or in respect of which any transmission is about to be registered, or a registration abstract granted under this Act, to produce any land grant, certificate of title, conveyance, bill of sale, mortgage deed, lease, will or any other instrument in his possession or within his control affecting such land or the title thereto:

(2) He may summon any such proprietor, mortgagee, or other person as aforesaid to appear, and give any explanation respecting such land, or the instruments affecting the title thereto, and if, upon requisition duly made by the Registrar-General, such proprietor, mortgagee, or other person refuses or neglects to produce any such instrument, or to allow the same to be inspected, or refuses or neglects to give any explanation which he is hereinbefore required to give, or knowingly misleads or deceives any person hereinbefore authorized to demand any such explanation, he shall for each such offence incur a penalty not exceeding Twenty Pounds; and the Registrar-General, if the instrument or information so withheld appears to him material, shall not be bound to proceed with the bringing of such land under the operation of this Act, or with the registration of such mortgage or sale, or with the issuing of such powers of mortgage or sale as the case may be.

(3) He may administer oaths, or, in lieu of administering an oath, may require any person examined by him to make and subscribe a declaration of the truth of the statements made by him in his examination.

10. It shall be lawful for the Governor, with the advice of the Executive Council, by warrant under his hand and the public seal of the said Province, to appoint two persons not being legal practitioners, who, together with the Registrar-General, shall be Commissioners for investigating and dealing with claims for the bringing of land under the provisions of this Act, and from time to time with like advice and in like manner to remove any of such Commissioners so appointed from office, and to appoint another person in his place.

11. The style of such Commissioners shall be the "Lands Titles Commissioners." The Registrar-General shall receive a reasonable salary. The other Commissioners shall be remunerated by fees on applications referred to them for bringing lands under the operation of this Act as set forth in the Schedule hereto marked T. At meetings of the said Lands Titles Commissioners, two shall form a quorum, and the Registrar-General, if present, shall preside as Chairman.

12. It shall be lawful for the said Commissioners, subject to the approval of the Governor, to appoint two legal practitioners, at reasonable salaries, to be their solicitors and permanent

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counsel, and also, subject to the like approval, to dismiss and discharge such solicitors and to appoint others in their stead.

13. All land alienated from the Crown within the said Province, from and after the first day of July, one thousand eight hundred and fifty-eight, shall be subject to the provisions of this Act.

14. Land, in the said Province, the grants of which may have been signed prior to the day appointed for this Act to come into operation, (whether such land shall constitute the entire or part only of the land included in any grant,) may, at the desire of the proprietor, be brought under the operation of this Act in the following manner, that is to say—The Proprietor shall deliver to the Registrar-General an application in form of the Schedule, hereto annexed, marked I, or in words to the like effect, and shall at the same time deposit with the Registrar-General all instruments in his possession or under his control constituting or in any way affecting his title to such land, together with an abstract of title in which he shall set forth and describe every instrument constituting or in any way affecting his title to such land, with the names and, so far as shall be within his knowledge, the addresses of all persons, if any, seised or possessed of any estate or interest in such land at law or in equity, in possession or in futurity, or expectancy, whether a life estate or of a greater or less description than a life estate, and shall make and subscribe a declaration to the truth of such abstract; or if such applicant proprietor be the sole and only person having estate or interest in such land, then he shall make and subscribe a declaration to that effect.

15. If, upon receipt of such application it shall appear to the satisfaction of the Registrar-General that the applicant proprietor is the original grantee of the land in respect to which application is made, and that such land has been granted on or subsequent to the nineteenth day of October, one thousand eight hundred and forty-two, and that no sale, mortgage, or other encumbrance transaction in any way affecting the title to such land has at any time been registered in the said Province, then, and in such case, the Registrar-General shall, once in each of two successive weeks, give public notice by advertisement in the South Australian Government Gazette, and in, at the least, one newspaper published in the City of Adelaide, in the said Province, that application has been made for the bringing of such land under the operation of this Act, which notice shall be in the form of the Schedule hereto annexed, marked J, or in words to the like effect: and the Registrar-General shall likewise cause copy of such notice to be posted in a conspicuous place in his office, and in such other public places as he may deem necessary; and in any such case if the Regis-

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trar-General shall not, within the space of two calendar months from the date of the latest of such advertisements as hereinbefore directed to be published, receive any caveat as hereinafter described, with respect to such land, it shall be lawful for him by notice to that effect published in the South Australian Government Gazette, to bring such land under the operation of this Act.

16. If it shall appear to the satisfaction of the Registrar-General that the applicant proprietor is not the original grantee of the land included in such application, or that the said land was granted prior to the nineteenth day of October, One thousand eight hundred and forty two, or that any transfer, transmission, mortgage, encumbrance, or beneficial interest, affecting the title to such land has been made, or has been registered in the said Province, or elsewhere, then and in such case the Registrar-General shall refer such application to the Lands Titles Commissioners for their consideration, and if it shall appear to the satisfaction of the said Commissioners that the title to the land included in such application has not been derived by transmission, and that every mortgage, encumbrance, or beneficial interest, affecting the title to the land so included has been released and satisfied, or if any such mortgage, encumbrance, or interest remains unsatisfied, that the parties interested therein are also parties to such application, then, and in either such case, the said Commissioners shall make and subscribe a warrant addressed to the Registrar-General, in form of the Schedule hereto annexed marked K, or in words to the like effect, which warrant shall contain a direction to the Registrar-General to cause notice of such application to be advertised three several times in the South Australian Government Gazette, and in at least one newspaper published in the City of Adelaide, and shall further limit and appoint a time, not less than one month nor more than twelve months from the date of the latest of such advertisements, upon or after the expiration of which, it shall be lawful for the Registrar-General, unless he shall in the interval have received a caveat as hereinafter described, to bring such land under the operation of this Act; but if it shall appear to the satisfaction of the said Commissioners that the title to the land included in such application has been derived by transmission, or that any parties interested in any unsatisfied mortgage or encumbrance affecting the title to such land, or any other party, beneficially interested therein, are not parties to such application, or that the evidence of title set forth by such applicant proprietor is imperfect, it shall be lawful for such Commissioners to direct the Registrar-General to reject such application altogether or, at their discretion, by warrant under their hand, in form of the

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Schedule hereto annexed marked K, or in words to the like effect, to direct the Registrar-General to cause notice of such application to be published in the South Australian Government Gazette, and in the London Gazette and in the Official Gazettes of each of the Colonies of New South Wales, Victoria, Tasmania, and New Zealand, or in any one or more of such Gazettes, and the said Commissioners shall in such warrant specify the number of times, and at what intervals, such advertisement shall be published in each or any of such Gazettes, and shall also limit and appoint a time, not less than two months nor more than three years from the date of the latest of such advertisements, upon or after the expiration of which, it shall be lawful for the Registrar-General, unless he shall in the interval have received a caveat as hereinafter described, to bring such land under the operation of this Act.

17. The Registrar-General, upon receipt of any such warrant as is hereinbefore for either case respectively directed to be issued under the hand of such Commissioners, shall cause notice to be published in such manner as in such warrant may be directed, that application had been made for bringing the land referred to in such warrant under the operation of this Act, and shall also cause copy of such notice to be posted in a conspicuous place in his office, and in such other public places as he may deem necessary; and the Registrar-General shall likewise forward through the post office copy of such notice, addressed to each former proprietor, mortgagee, or other person who may then, or at any previous time, have had or held any legal or equitable title, claim, or encumbrance, to or upon such land, as far as his knowledge of the facts of the case, and of the names and addresses of such persons may enable him, and if the Registrar-General shall not, within the time for that purpose limited and appointed in any such warrant, receive any caveat as hereinafter described, it shall be lawful for him, by notice published in the South Australian Government Gazette, to bring the land referred to or described in such warrant under the operation of this Act.

18. It shall be lawful for any person having or claiming an interest in any land so advertised as aforesaid, or for the attorney of any person having or claiming interest therein, within the time hereinbefore limited and appointed, or that may by warrant as aforesaid, under the hands of the Lands Titles Commissioners, be for that purpose limited and appointed, to lodge a caveat with the Registrar-General forbidding the bringing of such land under the operation of this Act, which caveat shall be in the form of the Schedule hereto annexed, marked L, or as near thereto as circumstances permit, and shall particularize the estate, interest, lien, or charge,

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claimed by the person lodging the same; and if such claim is made under any instruments other than those set forth in the abstract deposited by the applicant proprietor, the person lodging such caveat shall deliver a full and complete abstract of his title, which shall contain the same matters, and be subject to the same regulations as are hereinbefore prescribed for the case of an abstract deposited by the applicant proprietor.

19. The Registrar-General upon receipt of any such caveat within the time for either case limited as aforesaid, shall notify the same to such applicant proprietor, and shall suspend further action in the matter, and the lands in respect of which such caveat may have been lodged shall not be brought under the operation of this Act until such caveat shall have been withdrawn or shall have lapsed from any of the causes hereinafter provided, or until a decision shall have been obtained from the Court having jurisdiction in the matter.

20. After the expiration of three calendar months from the date thereof, every caveat shall be deemed to have lapsed unless the person by whom or on whose behalf the same was lodged shall, within that time, have taken proceedings to establish his title to the estate, interest, lien, or charge therein specified, and every person who shall fail to show probable cause for lodging such caveat to the satisfaction of the Judge before whom any prosecution may in such case be instituted shall forfeit and pay a penalty not exceeding One Hundred Pounds.

21. If, upon the application of any proprietor to have land, of which he is seised, brought under the operation of this Act, the Registrar-General shall refuse so to do, or if such applicant proprietor shall be dissatisfied with the direction upon his application, given by the Lands Titles Commissioners as hereinbefore provided it shall be lawful for such applicant proprietor to require the Registrar-General to set forth in writing, under his hand, his objections to the title of such applicant proprietor or the grounds upon which such direction was given, and such applicant proprietor may, if he think fit, at his own costs, summons such Registrar-General to appear before the Supreme Court to substantiate and uphold his objections to such title, such summons to be issued at the request of such applicant proprietor, or his solicitor, under the hand of a Judge of the said Court, and served upon such Registrar-General six clear days, at least, before the day appointed for the hearing of such objections, and such objections shall be heard by the said Court upon motion; and upon such hearing the said Court shall, if any such objections be a question of fact, direct an issue to be tried to decide such fact; and it shall thereupon be lawful for the said Court to forbid

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the bringing of such land under the operation of this Act, or to order that such land may be brought under the same, after the expiration of such period of time, as the said Court shall thing fit, not exceeding the period limited by any law, for the time being in force in the said Province as the period within which actions of ejectment may be brought, and the Registrar-General shall obey such order.

22. Upon any such motion as aforesaid, it shall be lawful for any person interested in any land touching or concerning the title to which such motion shall be made, and for the said Registrar-General by himself or his counsel, to argue the same before the said Court in support of or objection to, the bringing of such land under the operation of this Act, and the Registrar-General, or his solicitor, shall have the right of reply; and all expenses attendant upon any of the matters or proceedings aforesaid, shall be borne and paid by the person requiring such land to be brought under the operation of this Act.

23. Every notice for bringing land under the operation of this Act, hereinbefore directed to be published, shall be in the form of the Schedule hereto annexed, marked M, or in words to the like effect, and shall take effect and be valid to all intents from the date of the publication thereof.

24. The person entitled to bring land under the operation of this Act, and to receive a certificate of title in respect of the same, shall be the person in whom the fee simple is vested, or if there be no person in whom the fee simple is vested, then the person so entitled shall be the person holding the greatest estate and interest in such land, not being a mortgagee thereof: Provided always, that no mortgagor shall be entitled to bring land under the operation of this Act, or to receive a certificate of title for the same, without the consent of his mortgagee, which consent may be endorsed on the form of application in manner hereinafter prescribed.

25. It shall be lawful for any proprietor, being an applicant to have land brought under the operation of this Act, to withdraw his application at any time prior to the issuing of such notice; and the Registrar-General shall, in such case, upon request in writing signed by such applicant proprietor, return to him the abstract, and all instruments of title, deposited by such proprietor for the purpose of supporting his application.

26. The Registrar-General shall not notice any caveat forbidding the bringing of land under the operation of this Act, if the party lodging the same claims only an estate or interest to take effect after the determination, or in defeasance of an estate tail, or forbids the bringing of such land under the

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operation of this Act, on the plea only of the absence of legal evidence that a former proprietor was in being and capable at the time when any power of attorney executed by such proprietor was exercised by his attorney in the selling or purchasing, or releasing of such land.

27. Every grant, certificate of title, memorandum of sale, bill of mortgage, power of attorney, registration abstract, revocation order, bill of encumbrance, bill of trust, lease, or other instrument transferring or in any way affecting any estate or interest in land under the operation of this Act shall be in duplicate, and one original of every such instrument shall be filed in the Registry Office, and the other delivered to the proprietor or other person interested therein, or entitled thereto, and every instrument in this Act, directed to be filed or bound up in the register book, being so filed or bound up shall be held to be "Registered by Deposit" in terms of an Act passed by the Governor and Legislative Council of the said province on the ninth day of December, in the year of our Lord one thousand eight hundred and fifty-three, and in the seventeenth year of Her Majesty Queen Victoria intituled "An Act to provide for the Deposit of Deeds, Agreements, Writings, and Assurances, Maps and Plans, relating to hereditaments in the Province of South Australia, and for other purposes therein mentioned."

28. The Registrar-General shall keep a book to be called the "Register Book of Real Property" and shall bind up therein the duplicates of all grants and of all certificates of title issued from and after the first day of July, one thousand eight hundred and fifty-eight, and shall open therein a separate page for each grant and certificate of title, and shall record thereon the particulars of all instruments affecting the land included under each such grant or certificate of title, distinct and apart.

29. So soon as any land has been brought under the operation of this Act, the Registrar-General shall make out and deliver to the proprietor a certificate of title to the same in form hereinafter described and every such certificate of title shall contain a reference to the original grant or other instrument evidencing title, which may have been deposited by such proprietor when making application in manner hereinbefore described and the Registrar-General shall endorse on every such grant or instrument so surrendered a memorandum setting forth that the said grant or instrument had been surrendered by such proprietor in exchange for a certificate of title to such land pursuant to the provisions of this Act, with the date of such deposit; and if any grant or other instrument so deposited shall relate to or include any property, whether

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personal or real, other than the land included in such certificate of title, then the Registrar-General shall endorse on such grant or other instrument a memorandum setting forth that the said grant or instrument is cancelled in so far only as relates to the land included in such certificate of title, and shall return such grant or other instrument to such proprietor, otherwise he shall retain the same in his office.

30. Every certificate of title made out by the Registrar-General shall be in duplicate, and in the form marked A in the Schedule hereto, and the Registrar-General shall note by endorsement thereon, and in such manner as to preserve their priority, the particulars of all unsatisfied mortgages or other encumbrances, and of every lease, rent, charge, or term of years, or outstanding estate whatsoever, affecting such land, which shall have been registered, or of which he may have notice, and shall cause one of such certificates of title to be bound up in the Register book, and deliver the other to the proprietor entitled to the land described in such certificate, and every such certificate, duly authenticated under the hand and seal of the Registrar-General shall be received in all Courts of Justice as evidence of the particulars therein set forth and of their being entered in the register book in the manner set forth in such certificate.

31. No instrument shall be effectual to pass any estate or interest in any land under the operation of this Act, or to render such land liable as security for the payment of money, but so soon as the Registrar-General shall have entered the particulars thereof in the book of registry, and made endorsement on such instrument, as hereinafter directed to be made in each such case respectively, the estate or interest shall pass or, as the case may be, the land shall become liable to security in manner and subject to the conditions and contingencies set forth and specified in such instrument; and should two or more instruments executed by the same proprietor, and purporting to transfer or encumber the same estate or interest in any land, be at the same time presented to the Registrar-General for registration and endorsement, he shall register and endorse that instrument, under which the person claims property, who shall present to him the grant or certificate of title of such land for that purpose.

32. The Registrar-General shall not register any instrument purporting to transfer, or otherwise to deal with or affect any estate or interest in land under the operation of this Act, unless such instrument be in accordance with the provisions thereof.

33. Every certificate of title or entry in the register book shall be conclusive, and vest the estate and interests in the

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land therein mentioned in such manner and to such effect as shall be expressed in such certificate or entry valid to all intents, save and except as is hereinafter provided in the case of fraud or error.

34. Upon the first bringing of any land under the operation of this Act, and also upon the registering of the title to any land transmitted by will or intestacy there shall be paid to the Registrar-General the sum of one farthing in the pound sterling on the value of the land so brought under the operation of this Act or so transmitted, and if such land be situated within the limits of any Corporation or District Council, the declaration of such applicant proprietor, or person entitled under such transmission, accompanied by the certificate of the Mayor or of the Chairman of such Corporation or District Council setting forth the marketable value of such land at the time then being, and the amounts at which such land had been assessed at the assessment last before the bringing of such land under the operation of this Act, or last before such transmission, as the case may be, shall be received by the Registrar-General as sufficient evidence of the value of such land; and if such land be not situated within the limits of any Corporation or District Council or being within such limits it shall not have been assessed, the oath or solemn affirmation of the applicant proprietor or of the party entitled under such transmission, made before the Registrar-General or any Justice of the Peace, shall be received by such Registrar-General as evidence of the value of such land. Provided always that if the Registrar-General shall not be satisfied as to the correctness of the value so declared or sworn to, it shall be lawful for him to require such proprietor or other person as aforesaid to produce a certificate of such value under the hand of a sworn appraiser, which certificate shall be received as conclusive evidence of such value for the purposes herein specified.

35. All sums of money so received as aforesaid, shall be paid to the Treasurer of the said Province to constitute an Assurance Fund, out of which shall be made good the full amount awarded by any verdict or decree of Court to the rightful heir or proprietor of land under the operation of this Act as hereinafter provided, failing the recovery of such amount from the person who may by fraud, misrepresentation, or error, have become registered as proprietor of the same; and the said Treasurer may from time to time invest such sums in the South Australian Government Securities: Provided always that in case of deficiency in such Assurance Fund the full amount so awarded shall be made good to such

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rightful heir or proprietor out of the General Revenues of the said province.

36. When land under the operation of this Act is intended to be disposed of by sale, the vendor shall execute a memorandum of sale, in form of the Schedule hereto annexed marked B, or as near thereto as circumstances permit, which memorandum shall contain such description of the land intended to be transferred as is contained in the original grant, or in the certificate of title of such land, or such description as may be sufficient to identify that particular portion of land which it is intended to dispose of, and shall contain an accurate statement of the estate or interest of such vendor intended to be transferred, and a memorandum of all mortgages and other encumbrances affecting the same; and if such land be leased, the name and description of the lessee with a memorandum of the lease, and every such memorandum of sale shall be attested by a witness.

37. Every memorandum of sale for the transfer of land under the operation of this Act, when duly executed, shall be produced to the Registrar-General, who shall thereupon enter in the register book, under the original entry respecting such land, the name, residence, and description of the vendor, or of each vendor if more than one; the name, residence, and description of the purchaser, or of each purchaser if more than one; the amount of the consideration money paid; the date of the memorandum of sale, and of its production, and such other particulars as the Registrar-General may deem necessary, and shall endorse on such memorandum of sale, and also on the grant or certificate of title, the fact of such entry having been made, with the date and hour thereof, and shall sign each such endorsement and shall affix his seal to such memorandum of sale, and the particulars of every such memorandum of sale shall be entered in the register book in the order of the production thereof, and upon such entry being made by the Registrar-General, the land, or the estate or interest therein, as set forth and limited in such memorandum of sale as to be transferred, shall pass to and vest in the purchaser.

38. If the estate or interest in such land, so passed to and vested in such purchaser in manner aforesaid, shall be of a description less than a fee simple, the memorandum of sale so endorsed and authenticated, under the hand and seal of the Registrar-General shall be received in any Court of Justice as sufficient evidence of the title of such purchaser to the estate or interest therein set forth and limited.

39. If the memorandum of sale purports to transfer a full estate in fee simple in any land, the vendor shall at the same

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time deliver up the grant or certificate of title of such land, and the Registrar-General shall in such case endorse on such grant or certificate of title, a memorandum cancelling such grant or certificate of title, setting forth the day and hour on which such grant or certificate of title had been delivered up to him for that purpose, with the name, residence, and description of the vendor by whom the same was so given up, and the particulars of the transfer occasioning the surrender and cancelling of such grant or certificate of title.

40. The Registrar-General shall thereupon make out a certificate of title of such land to the purchaser, referring therein to the original grant of such land, and to the memorandum of sale thereof, to such purchaser and in case the vendor shall, by such memorandum of sale as aforesaid, have contracted to transfer the fee simple of part only of the land included under the grant or certificate of title so delivered up to be cancelled, then the Registrar-General shall make out a certificate of title to such proprietor of the unsold balance of such land so included as aforesaid.

41. If any estate or interest in land under the operation of this Act, or any charge on such land, become transmitted in consequence of the death or bankruptcy, or insolvency of any proprietor, or in consequence of the marriage settlement of any female proprietor, or by any lawful means other than by a transfer according to the provisions of this Act, such transmission shall be notified to the Registrar-General, by a declaration of the person to whom such estate or interest has come by transmission, made in the form marked X. in the Schedule hereto, and containing a statement describing the manner in which and the party to whom such estate or interest has come by transmission, and such declaration shall be made and subscribed if the declarant resides at or within ten miles of the General Registry Office, then in the presence of the Registrar-General; if beyond that distance, then in the presence of the Registrar-General or any Justice of the Peace, if the declarant resides in the United Kingdom of Great Britain and Ireland, or in any British Possession, other than the said Province, or in any foreign place, then in the presence of any of the persons hereinafter appointed respectively as persons before whom the execution of instruments executed beyond the limits of the said Province may be proved.

42. If such transmission has taken place by virtue of the bankruptcy or insolvency of any proprietor, the said declaration shall be accompanied by such evidence as may for the time being, be receivable in courts of justice in the said Province as proof of the title of parties claiming under any bankruptcy or insolvency: and if such transmission has taken place

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by virtue of the marriage settlement of a female proprietor the said declaration shall be accompanied by such marriage settlement, or by a copy thereof duly authenticated, and a copy of the register of such marriage, or other legal evidence of the celebration thereof, and shall declare the identity of the said female proprietor; and if such transmission has taken place by virtue of any will or testamentary instrument, then if such will or testamentary instrument shall have been made in the said Province, the said declaration shall be accompanied by such will; and if made in England, Wales, or Ireland, the said declaration shall be accompanied by such will, or by the probate thereof; and if made in Scotland, or in any British Possession, or in any foreign country, such declaration shall be accompanied by such will, or by any copy thereof, that may be evidence by the laws of Scotland, or of such possession or foreign country; and if such transmission shall have taken place in consequence of an intestacy, then, if such intestacy shall have occurred in the said province, or in England, Wales or Ireland, the said declaration shall be accompanied by the letters of administration or an official copy thereof; and if in Scotland, or in any British Possession, or foreign country, then by letters of administration, or any copy thereof, or by such other documents as by the laws of Scotland, or of such possession, or foreign country, may be receivable in the Courts of Judicature thereof as proof of intestacy, together with such documentary or other evidence as may be sufficient to prove the title of such declarant to the estate or interest in such land, according to the laws for the time being in force in the said Province.

43. The Registrar-General, upon the receipt of such declaration, so accompanied as aforesaid, shall, in the case of insolvency, or marriage settlement, enter the name of the person, entitled under such transmission, in the register book as owner of the estate or interest so transmitted, and shall file such declaration in his office, and shall also endorse on the grant or certificate of title of the land in which the estate or interest is transmitted, or as the case may be, on the bill or mortgage, bill of encumbrance, lease, or other instrument evidencing title to the estate or interest transmitted, a memorandum stating the day and hour on which such transmission had been recorded in the register book as aforesaid.

44. In the case of transmission by will, or in consequence of an intestacy, the Registrar-General, upon receipt of such declaration, so accompanied as aforesaid, shall give notice by advertisement, published once in each of two successive weeks of the South Australian Government Gazette, and in at least one newspaper published in the City of Adelaide, that he has

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received such declaration, which notice shall be in form of the Schedule hereto annexed, marked J, or in words to the like effect; and the Registrar-General shall cause a copy of such notice to be posted in a conspicuous place in his office, and in such other public place as he may deem necessary; and in any such case, if the Registrar-General shall not, within the space of one calendar month from the date of the latest of such advertisements, receive any caveat forbidding compliance with such application, he shall enter the name of the person entitled under such transmission, in the register book, as owner of the estate or interest so transmitted; and shall, in other respects, proceed as hereinbefore directed for the case of a transmission by insolvency; and the Registrar-General, if he shall receive any such caveat within the time for such case above limited, shall, if the party lodging the same show reasonable grounds for so doing, suspend action in the matter, until such caveat shall have been withdrawn or until a decision shall have been obtained from the Court, having jurisdiction in the matter; and every person who shall fail to show reasonable cause for lodging such caveat to the satisfaction of the Judge, before whom any prosecution or suit may in such case be instituted, shall forfeit and pay a penalty not exceeding One hundred pounds.

45. No transmission of land under the operation of this Act either by descent, will, appointment of assignees or trustees, vesting order, letters of administration, order of the Supreme Court, or otherwise howsoever, by any proceeding filed of record, shall be valid and effectual against any subsequent purchaser, mortgagee, or lessee, unless legal evidence of heirship, the probate or exemplification of probate of such will, appointment of assignees, or trustees, vesting order, letters of administration, order of the Supreme Court or other instrument hereinbefore required to be in such case produced, has been so produced to the Registrar-General, and the particulars of the transmission entered in the register book.

46. It shall be lawful for the Supreme Court without prejudice to the exercise of any other power such Court may possess, upon the summary application of any person interested in transmitted land, made either by petition or otherwise, and either *ex parte*, or upon service of notice on any other person, as the Court may direct, to issue an order prohibiting for a time to be named in such order any dealing with such land; and it shall be in the discretion of such Court to make or refuse any such order, and to annex thereto any terms or conditions it may think fit, and to discharge such order when granted with or without costs, and generally to act in the premises in such manner as the justice of the case may re-

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quire; and the Registrar-General, without being made a party to the proceedings, upon being served with such order or an official copy thereof, shall obey the same.

47. When any land under the operation of this Act is intended to be leased or demised for a term of years, the proprietor shall execute a lease in form of the Schedule hereto annexed marked C, or as near thereto as circumstances permit, and every such lease shall contain the same description that is given in the grant or certificate of title or such other description as may be sufficient to identify the land intended to be leased, and shall be attested by a witness; and such lease when so executed, together with the grant, certificate of title, or other instrument evidencing the title of such proprietor to an estate in such land, shall be presented to the Registrar-General, who shall record in the register book the date and hour of such production to him, the date of the lease, the amount of rent or consideration money, the dates on which it is appointed to be paid and the names and description of the proprietor and of the lessee, and shall record the like particulars by memorandum on the grant, certificate of title, or other instrument as aforesaid, and shall endorse on the lease a memorandum of the day and hour on which the said particulars had been entered in the register book, and shall authenticate such memorandum by signing his name and affixing his seal thereto; and every lease bearing such memorandum, so authenticated, shall be received as sufficient evidence of the title of the lessee to the estate or interest therein demised, and of all covenants, conditions, and restrictions therein expressly set forth, or by this Act declared to be implied against the lessor and lessee respectively.

48. A right to purchase land under the operation of this Act may be granted in any such lease by the words "that the said lessee shall have the option of purchasing the said land subject to such conditions, limitations and restrictions as are herein specified;" which form of words shall operate as an expressed covenant in such lease, and shall apply as follows, that is to say— if the said lessee shall elect to purchase the said land, and shall in all respects comply with such conditions as may be expressed in such lease, or are by this Act declared to be implied therein, and shall pay the purchase money therein mentioned, together with all rent, arrears of rent, and other moneys due and owing under or by virtue of such lease, then and in such case the lessor will execute a memorandum of sale of such land to such lessee, and will perform all acts and execute all instruments by this Act prescribed to be performed or executed by a vendor, in order to transfer to such lessee the estate or interest in such land specified.

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49. The entry of every such lease in the register book, shall be held to transfer to the lessee an estate in such land as tenant, subject, nevertheless, to all such conditions and covenants as may be expressly set forth in such lease, if any, and to the conditions and covenants which are hereinafter declared to be implied against a lessor and against a lessee, or to all or any of such last-mentioned covenants as shall not be negatived or modified by express declaration in such lease or endorsed thereon: Provided always, that no lease of mortgaged land executed subsequent to the mortgage, shall be valid and binding against the mortgagee, unless such mortgagee shall have consented to such lease, in form and manner hereinafter provided.

50. Whenever any lease or demise for a term of years is intended to be surrendered, there shall be endorsed upon such lease the word "surrendered" with the date of such surrender, and upon such lease bearing such endorsement, signed by the lessee, and by the lessor accepting such surrender, and duly attested in manner hereinafter prescribed, being brought to the Registrar-General, he shall enter in the register book a memorandum recording the date of such surrender, and shall likewise endorse upon the lease a memorandum recording the fact of such entry having been made in the register book, and upon such entry being so made in the register book, the estate or interest of the lessee in such land shall revert in the lessor, or in such other person, as, having regard to other intervening circumstances, if any, the same would be vested in had no such lease ever been executed, and the production of such lease bearing such endorsement authenticated by the hand and seal of the Registrar-General shall be sufficient evidence that such lease had been so surrendered.

51. When any estate or interest in land, under the operation of this Act, is intended to be made security for a loan or other valuable consideration, the borrower shall execute a bill of mortgage, in form of the Schedule hereto annexed, marked D, or as near thereto as circumstances permit, and every such bill of mortgage shall contain an accurate statement of the estate or interest intended to be mortgaged, and such description as is given in the grant or certificate of title of the land in which such estate or interest is held, or such other description as may be necessary to identify such land, and shall be attested by a witness; and every bill of mortgage so executed, together with the grant or certificate of title of such land, or as the case may be, the lease or other instrument, proving the title of the mortgagor to such estate or interest in such land, shall be produced to the Registrar-General, who shall enter in the register book the date and hour of such produc-

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tion to him; the date of mortgage; the name, residence, and description of the mortgagor and of the mortgagee; the amount of consideration money; the rate of interest, and the date, if any, appointed for the redemption of such mortgage; and the dates on which interest is appointed to be paid; and shall record the like particulars by a memorandum endorsed upon such grant or certificate of title, lease, or other instrument of title, and shall also endorse upon such grant or certificate of title, lease, or other instrument, a memorandum stating the day and hour of the day in which the particulars of such mortgage had been recorded in the register book, and, upon such entry being made, as aforesaid, in the register book, the estate or interest in the land referred to, and described in such bill of mortgage, shall be held by such mortgagor, subject to and liable for the payment of the principal sum and interest therein set forth, at the times and under the conditions and covenants therein prescribed, or hereafter declared to be implied in bills of mortgage.

52. The repayment of any sum of money by weekly installments, or other periodical payments, may be secured on any land or on any estate or interest therein, by bill of mortgage, in the form or to the effect of the said Schedule D to this Act annexed, by varying such form so as to express fully the terms and modes and plan of payment of such sum of money: Provided also, that the period of time hereinafter limited as the period after expiration of which it shall be lawful for a mortgagee to sell an estate pledged as security, in the event of default made in payment of interest or principal, or in the non-fulfillment of any covenant, may, by condition expressed in any such bill of mortgage, be extended or shortened, and, notwithstanding such variations in such form, the like covenants, rights, powers and obligations shall be implied thereunder and thereby, both against the mortgagor and the mortgagee as would be implied if no such variation had been made in the form of such Schedule.

53. In case default shall be made for the space of two calendar months, in payment of the principal money or interest, or any part thereof, secured by any such bill of mortgage, so recorded as aforesaid, or if default shall be made in observance of any covenant that may be expressed in such bill of mortgage, or that is therein as against the mortgagor hereinafter declared to be implied, and the mortgagee shall have caused a written demand of payment of such principal sum or interest, or as the case may be, for the fulfillment of any such expressed or implied covenant, in respect to which such default may have been made, to be served on the mortgagor, or left at his last or usual place of abode, or if the mortgage

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be made by a corporate body, with the clerk thereof; and if default be made in either such respect for the further space of two calendar months from the service of such demand, then in such case, it shall be lawful for the mortgagee to sell the estate or interest pledged to him as security by such bill of mortgage, or any part thereof, and either altogether or in lots, and either by public auction or private contract, or by both of such means, and subject to such conditions as he may think fit, and with power to buy in and resell the same, without being liable for any loss occasioned thereby, and to make and execute all such instruments, and to perform all such acts as in accordance with the provisions of this Act may be necessary for carrying into effect the powers hereby given, including the act of entering upon, and taking and giving possession to the purchaser of the land so pledged as security; all which sales, contracts, matters and things hereby authorized, shall be as valid and effectual, as if the mortgagor had made, done or executed the same; and the receipt or receipts in writing of the mortgagee shall be a sufficient discharge to any purchaser of any part of such mortgaged property, for so much of his purchase-money as may be thereby expressed to be received; no such purchaser shall be answerable for the loss, misapplication or nonapplication, or be obliged to see to the application of the purchase money by him paid, nor shall he be concerned to inquire as to the fact of any such default or demand, as aforesaid, having been made; the moneys to arise from such sale, as aforesaid shall be applied: First—In payment of the expenses attending any such sale, or otherwise incurred in the execution of the power of sale hereby given: Secondly—In repayment of the principal money and interest remaining due, together with any costs and expenses occasioned by the non-payment thereof, or the non-observance of any such expressed or implied covenant; the surplus (if any) shall be paid to the mortgagor.

54. The Registrar-General, in any such case as aforesaid, upon receipt of a memorandum of sale of such estate or interest, so pledged as aforesaid, signed by such mortgagee, together with proof to his satisfaction that all the requirements for such case by this Act provided have been duly executed and fulfilled, shall enter the particulars of such memorandum of sale in the register book, and record the fact of such entry by endorsement on such memorandum of sale, and shall in all other respects proceed in manner herein prescribed for the case of the transfer of a like estate or interest by the proprietor thereof, and every such transfer, when so recorded by the Registrar-General shall be as valid and effectual to pass such estate or interest, as if the memorandum of sale had

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been executed by the mortgagor prior to the date of the execution of the bill of mortgage; and if such memorandum of sale shall purport to pass an estate in fee simple, and the existing grant or certificate of title be for that purpose surrendered to him, the Registrar-General shall make out and deliver to the purchaser a certificate of title to such land, having first endorsed thereon memoranda setting forth the particulars of all unsatisfied mortgages or other encumbrances, and of all leases, transfers, or other transactions affecting such land if any, which shall appear to have been registered and recorded upon such grant or certificate of title so surrendered, and shall in all other respects proceed as hereinbefore is directed in the case of the sale of an estate in fee simple in land under the operation of this Act.

55. The Registrar-General, on the production of any bill of mortgage, executed under the provisions of this Act, and having thereon a receipt for the mortgage money duly signed and attested, shall make an entry in the register book to the effect that such mortgage has been discharged; and upon such entry being made, the estate, or interest, which by such bill of mortgage had been pledged as security for such loan, shall cease to be subject to or liable for the same, or any charges incident thereon, and the Registrar-General shall likewise endorse upon the grant or certificate of title, lease, or other instrument constituting or evidencing the title of the mortgagor to the estate or interest in such land, a memorandum of the discharge of such mortgage, and of the date of such discharge, and shall cancel such bill of mortgage: Provided always, that if at or after the date appointed for the redemption of any such mortgage, the mortgagee shall be absent from this Colony, or shall not be in attendance to receive the mortgage money either personally, or by his attorney duly authorized in that respect, it shall be lawful for the Registrar-General to receive such mortgage money, with all arrears of interest then due thereon, in trust for such mortgagee, and the Registrar-General shall, thereupon make entry in the register book discharging such mortgage, stating the day and hour in which such entry is made, and such entry shall be a discharge for such mortgage, valid to all intents, and shall have the same force and effect as is hereinbefore given to a like entry when made upon the production to the Registrar-General of the bill of mortgage, with the receipt of the mortgagee, and the Registrar-General shall, if demanded, give to the mortgagor a receipt for the money so paid to him in trust, and shall endorse on the grant, certificate of title, or other instrument, as aforesaid, and also on the bill of mortgage, whenever those instruments shall be brought to him for that purpose, the

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several particulars hereinbefore directed to be endorsed on each of such instruments respectively.

56. Whenever it is intended to render an estate or interest in land, under the operation of this Act, available for securing any dower, annuity, or sum of money, or to invest such estate or interest in trust, the proprietor shall execute a bill of encumbrance, in form of the Schedule hereto annexed marked E, or as near thereto as circumstances will permit; or, as the case may require, a bill of trust, in form of the Schedule hereto annexed marked F, or as near thereto as circumstances will permit, which bill of encumbrance or bill of trust shall be attested by a witness, and shall set forth the nature of the estate or interest intended to be encumbered or invested in trust; the amount of dower, or annuity, or sum of money for securing which such estate or interest is intended to be encumbered or invested in trust; the date on which, the manner in which, and the conditions or contingencies under which such dower, annuity, or sum of money is to become payable; and the uses, contingencies, restrictions, reversions, and remainders to which it is intended such dower, annuity, or sum of money should be subject or liable, if any, together with such description as may be sufficient to identify the land in which the estate or interest intended to be encumbered or vested in trust is held; and such bill of encumbrance, or bill of trust, together with the grant, certificate of title, lease, or other instrument evidencing the title of the encumbrancee to the estate or interest in such land intended to be encumbered or vested in trust shall be produced to the Registrar-General who shall enter the particulars of such bill of encumbrance or bill of trust in the register book, and shall endorse upon the grant, certificate of title, lease, or other instrument, as aforesaid a memorandum stating the date and hour of such production to him, for the purpose of such record being made, the date of the bill of encumbrance or bill of trust, the amount of the encumbrance, the contingencies, restrictions, reversions and remainders, to which it is intended to be subject if any, and the names and descriptions of the parties for whose benefit the same is created, or for whose uses such land is vested in trust, together with the names and descriptions of the trustees if any, appointed, and upon such entry being made in the register book the estate or interest set forth in such bill of encumbrance or bill of trust shall become subject to and liable for the payment of such sums of money, dower, annuity, or other encumbrance in accordance with the conditions and limitations and subject to the covenants set forth in such bill of encumbrance or of trust, or which are hereinafter declared to be implied in any such instrument or as the case may be, such estate or interest shall become

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vested in the trustees named in such bill of trust, subject to such conditions and trusts as aforesaid.

57. The Registrar-General, on the production of any bill of encumbrance, or of any bill of trust executed under the provisions of this Act, with a receipt for the amount of the encumbrance money, or trust money, endorsed thereon, duly signed and attested, or upon the receipt of proof to his satisfaction that the occurrence of the circumstances under which the amount of such encumbrance or trust could become chargeable against such land, in accordance with the conditions, limitations and restrictions prescribed in such bill of encumbrance or bill of trust has ceased to be possible, shall make an entry in the register book to the effect that such encumbrance or trust has been discharged, or has lapsed, stating the day and hour in which such entry is made, and upon such entry being made, the interest, if any, which passed to the encumbrancee or to the trustees under such bill of trust, shall vest in the same person or persons in whom the same would, having regard to intervening acts and circumstances if any, have vested, if no such bill of encumbrance or bill of trust had ever been executed or made, and the Registrar-General shall thereupon cancel such bill of encumbrance or bill of trust, and shall also endorse on the grant, certificate of title, lease, or other instrument, constituting or evidencing the title of the encumbrancer to the estate or interest in the land referred to in such bill of encumbrance, a memorandum stating that such encumbrance had been discharged, and the date on which such entry of discharge had been made in the register book.

58. Every bill of mortgage, or bill of encumbrance, or of trust, shall be entered by the Registrar-General in the register book in the order of time in which the same is produced to him for that purpose; and the Registrar-General shall record by memorandum on such bill of mortgage, or bill of encumbrance, or of trust that the same has been so entered by him, stating the day and hour of such entry, and shall certify such memorandum by signing the same and affixing his seal thereto, and every such bill of mortgage, bill of encumbrance, or of trust, so certified, shall be received in all Courts of Justice as sufficient evidence that the estate and interest therein described had been so mortgaged, encumbered, or vested in trust as the case may be, and of all other particulars therein contained.

59. If more than one mortgage, bill of encumbrance or of trust, be registered in respect to or affecting the same estate or interest in any land under the operation of this Act, the mortgagees, encumbrancees, and trustees, shall notwithstanding any express, implied, or constructive notice, be entitled in priority one over the other according to the date at which each

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instrument is recorded in the register books, and not according to the date of each instrument itself.

60. When any estate or interest in land under the operation of this Act shall by bill of encumbrance, or bill of trust, be transferred to any person or body corporate, to the use of or in trust for any other person, the whole legal ownership of such estate or interest shall vest in the person or body corporate to whom the same shall be so immediately and directly transferred; subject, however, to a trust for the benefit of such other person. Every limitation which before the passing of this Act might have been made by way of shifting, springing, or executory use, shall hereafter be made by transfer, in manner hereinbefore provided, without the intervention of uses, but not otherwise.

61. No registered mortgage or encumbrance of any land under this Act shall be affected by any act of bankruptcy or insolvency committed by the mortgagor or encumbrancer, after the date of the entry in the register book of the bill of mortgage, bill of encumbrance, or bill of trust, creating such mortgage or encumbrance, notwithstanding such mortgagor, or encumbrancer, at the time of his becoming bankrupt may have in his possession and disposition and be the registered owner of such land; and such mortgage or encumbrance shall be preferred to any right, claim, or interest in such land, which may belong to the assignees of such bankrupt or insolvent.

62. A registered mortgage, a registered lease, or the interest of a registered encumbrancee of any land under this Act may be transferred to any person, by endorsement on the bill of mortgage, lease, bill of encumbrance, or bill of trust, which endorsement shall be in the form of the Schedule hereto annexed marked O, or in words to the like effect; and on the production of such bill of mortgage, lease, or bill of encumbrance, so endorsed, to the Registrar-General, he shall enter in the register book the name of the transferee as mortgagee, lessee, or encumbrancee, of the land therein mentioned, and shall, by memorandum under his hand, record on such bill of mortgage, or bill of encumbrance, or lease, and, if the same be presented to him for that purpose, on the grant, certificate of title, or other instrument evidencing title to the estate or interest mortgaged or encumbered, that such transfer had been recorded by him, stating the date and hour of such record; and, upon such entry being so made, the estate or interest of the transferrer, as set forth in such instrument, with all rights, powers, and privileges thereto belonging or appertaining, shall pass to the transferee; and such transferee shall thereupon become subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable if named in such

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instrument originally as mortgagee, encumbrancee, or lessee, of such land, estate, or interest, and the Registrar-General shall certify such endorsement by signing the same, and affixing his seal thereto, and every transfer, so certified, shall be received in evidence by any Court of Justice as sufficient evidence of its having been so entered in the register book.

63. In every memorandum of sale, bill of mortgage, bill of encumbrance, bill of trust, lease, or other instrument of transfer, for valuable consideration, under provisions of this Act, there shall be implied the following covenants by each transferring party, severally for himself, to the extent of the interest departed with by him, that is to say—

(1) That such transferring party hath good right and full power to transfer and assure the estate and interest purported to be transferred, and that free and clear from all encumbrances, other than such as are therein mentioned: That it shall be lawful for the party to whom such estate or interest is transferred quietly to enjoy the same, without any disturbance, by any act whatsoever, of such conveying party, or any person claiming under him, or by any rightful act of any other person:

(2) That such transferring party will, at the cost of the party requiring the same, do all such acts and execute all such instruments as in accordance with the provisions of this Act may be necessary to give effect to all covenants, conditions, and purposes expressly set forth in such memorandum of sale, bill of mortgage, bill of encumbrance or trust, lease, or other instrument of transfer as aforesaid, or by this Act declared to be implied against the transferring party in any such instrument.

64. In every bill of mortgage, there shall be implied the following covenants against the mortgagor, that is to say—

(1) That he will pay the principal money, and interest thereby secured, after the rate, and at the times therein mentioned, without any deduction whatsoever;

(2) That the mortgagor will repair and keep in repair all buildings or other improvements erected and made upon such land; and that the mortgagee may, at all convenient times, until such mortgage be redeemed, be at liberty, with or without surveyors or others, to enter into and upon such land, to view and inspect the state of repair of such buildings or improvements.

65. In every lease there shall be implied the following covenants against the lessee, that is to say—

(1) That he will pay the rent thereby reserved at the times therein mentioned, and all rates and taxes which may be payable in respect of the demised property, during the continuance of the lease;

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(2) That he will keep and yield up the demised property in good and tenantable repair.

66. In every lease there shall also be implied the following powers in the lessor, that is to say—

(1) That he may, by himself, or his agents, at all reasonable times, enter upon the demised property, and view the state of repair thereof, and may serve upon the lessee, or leave at his last, or usual place of abode, a notice, in writing, of any defect, requiring him, within a reasonable time to be therein prescribed, to repair the same;

(2) That whenever the rent reserved shall be in arrear for twenty-one days, he may levy the same by distress;

(3) That in case the rent, or any part thereof, shall be in arrear for the space of six calendar months; or in case insurance as aforesaid shall not have been effected, or in case default in the fulfillment of any covenant expressly set forth in such lease as against the lessee shall not have been repaired, or in case the repairs required by such notice as aforesaid shall not have been completed within three calendar months after the service or leaving thereof, it shall be lawful for him to re-enter upon the demised property, and, upon proof of such re-entry, under any such circumstances, being made to the satisfaction of the Registrar-General, he shall note the same by entry in the register book, and the estate in the lessee in such land shall thereupon determine but without releasing him from his liability in respect of the breach of any covenant in such lease expressed or implied.

67. Such of the covenants hereinafter set forth as shall be expressed in any lease or mortgage, as to be implied against the lessee or mortgagor, shall, if expressed in the form of words hereinafter appointed and prescribed for the case of each such covenant respectively, be so implied against such lessee or mortgagor as fully and effectually as if such covenants were set forth fully and in words at length in such lease or mortgage; that is to say, the words "that he will insure," shall imply as follows: That he will insure and so long as the term expressed in the said mortgage or lease shall not have expired, will keep insured, in some public insurance office, to be approved by such mortgagee or lessor, against loss or damage by fire, to the full amount specified in such lease or bill of mortgage, or if no amount be specified, then to their full value all buildings, tenements, or premises erected on such land, which shall be of a nature or kind capable of being insured against loss or damage by fire, and that he will, at the request of the mortgagee or lessor, hand over to, and deposit with him, the policy of every such insurance, and produce to him the receipt or receipts for the annual or other premiums payable on ac-

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count thereof; Provided always, that all moneys to be received under or by virtue of any such insurance shall, in the event of loss or damage by fire, be laid out and expended in making good such loss or damage; Provided also, that if default shall be made in the observance or performance of the covenant last above mentioned, it shall be lawful for the mortgagee or lessor, without prejudice nevertheless, to and concurrently with the powers granted him by his bill of mortgage or lease, in manner in and by this Act provided, to insure such building, and the costs and charges of such insurance shall, until such mortgage be redeemed, or such lease shall have expired, be a charge upon the said land; the words "and paint outside every alternate year" shall apply as follows, viz.—and also will, in every alternate year, during the currency of such lease, paint all the outside woodwork and ironwork belonging to the hereditaments and premises mentioned in such lease, with two coats of proper oil colors, in a workmanlike manner; the words "and paint and paper inside every third year" shall imply as follows, viz.—and will, in every third year, during the currency of such lease, paint the inside wood, iron, and other works now or usually painted with two coats of proper oil-color, in a workmanlike manner; and also repaper, with paper of a quality as at present, and such parts of the said premises as are now papered; and also wash, stop, whiten, or color such parts of the said premises as are now whitened or colored respectively; the words "and will fence" shall apply as follows, viz.—and also will, during the continuance of the said lease, erect and put up on the boundaries of the land therein mentioned, or upon such boundaries upon which no substantial fence now exists, a good and substantial fence capable of resisting the trespass of horses, oxen, bulls, and cows; the words "and cultivate" shall apply as follows, viz.—and will at all times during the said lease cultivate, use, and manage all such parts of the land therein mentioned as are or shall be broken up or converted into tillage in a proper and husband-like manner, and will not impoverish or waste the same; the words "that the said lessee will not use the said premises as a shop" shall apply as follows, viz.—and also that the said lessee will not convert, use, or occupy the said hereditaments and premises mentioned in such lease, or any part thereof, into or as a shop, warehouse, or other place for carrying on any trade or business whatsoever, or permit or suffer the said hereditaments and premises, or any part thereof, to be used for any such purpose or otherwise than as a private dwelling house, without the consent in writing of the said lessor; the words "and will not carry on offensive trades" shall apply as follows—and also that no noxious, noisome, or offensive art,

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trade, business, occupation, or calling shall at any time during the said term be used, exercised, carried on, permitted, or suffered in or upon the said hereditaments and premises above mentioned, and that no act, matter, or thing whatsoever shall at any time during the said term be done in or upon the said hereditaments and premises, or any part thereof, which shall or may be or grow to the annoyance, nuisance, grievance, damage, or disturbance of the occupiers or owners of the adjoining lands and hereditaments; the words "and will not, without leave, assign, or sublet," shall apply as follows, viz.—and also that the said lessee shall not nor will during the term of such lease, assign, transfer, demise, sublet, or set over, or otherwise by any act or deed procure the lands or premises therein mentioned, or any of them, or any part thereof, to be assigned, transferred, demised, sublet, or set over unto any person whomsoever without the consent in writing of the said lessor first had and obtained; the words "and will not cut timber" shall apply as follows: And also that the said lessee shall not nor will cut down, fell, injure, or destroy any growing or living timber, or timberlike trees, standing and being upon the said hereditaments and premises above mentioned, without the consent in writing of the said lessor; the words "and will carry on the business of a publican, and conduct the same in an orderly manner," shall apply as follows, viz.—and also that the said lessee will, at all times during the currency of such lease, use, exercise, and carry on, in, and upon the premises therein mentioned, the trade or business of a licensed victualler or publican and retailer of spirits, wines, ale, beer, and porter, and keep open and use the messuage, tenement, or inn, and buildings standing and being upon the said land as and for an inn or public house for the reception, accommodation and entertainment of travellers, guests, and other persons resorting thereto or frequenting the same, and manage and conduct such trade or business in a quiet and orderly manner, and will not do, commit, or permit, or suffer to be done or committed, any act, matter, or thing whatsoever, whereby or by means whereof any license shall or may be forfeited or become void or liable to be taken away, suppressed, or suspended in any manner howsoever; the words "and will apply for renewal of license" shall apply as follows, viz.—and also shall and will from time to time during the continuance of the said term, at the proper times for that purpose, apply for and endeavor to obtain, at his own expense, all such licenses as are or may be necessary for carrying on the said trade or business of a licensed victualler or publican, in and upon the said hereditaments and premises, and keeping the said messuage, tenement, or inn open as and for an inn or public-house as aforesaid; the

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words "and will facilitate the transfer of license" shall apply as follows, viz: And also shall and will, at the expiration or other sooner determination of the said lease, sign and give such notice or notices, and allow such notice or notices of a renewal or transfer of any license as may be required by law to be affixed to the said messuage, tenement, or inn, to be thereto affixed, and remain so affixed during such time or times as shall be necessary or expedient in that behalf, and generally to do and perform all such further acts, matters, and things, as shall be necessary to enable the said lessor, or any other person authorized by him, to obtain the renewal of any license, or any new license, or the transfer of any license then existing and in force.

68. In every transfer of land under a bill of encumbrance, or of trust, by way of marriage settlement, there shall be implied the following powers in every tenant for life, in possession of the property or of any undivided share thereof, or in his guardian, or in the committee of his estate, or in case there shall be no tenant for life in possession, then in the trustees of the settlement, that is to say—that he or they may demise or lease, or concur in respect of such share in demising or leasing the property, estate or interest in settlement, for any term not exceeding twenty-one years, to take effect in possession at a reasonable yearly rent, without taking any fine or premium for the making such lease, and so that the lessee or lessees do execute a counterpart thereof.

69. There shall also be implied in the trustees of the settlement, at the request in writing of any tenant for life in possession, or his guardian, or committee; or if there be no such tenant for life, then at their own discretion, the following powers, that is to say—that they may dispose of the property in settlement, or any part thereof, either by way of sale, or in exchange for other property of the like nature and tenure, situated within the said province; or where such property shall consist of an undivided share, may concur in the partition of the entirety of such property; and may give or take any money by way of equality of exchange or partition: Provided that the moneys to arise from any such sale, or be received for equality of exchange or partition, shall, with all convenient speed, be laid out in the purchase of other property, of like nature and tenure, situate within the said Province; and, moreover, any property so purchased or taken in exchange, shall be settled in the same manner and subject to the same trusts, powers, and provisoes, as the property so sold or given in exchange: Provided also, that until the moneys received in consequence of such sale, or exchange, or partition, shall be laid out as aforesaid, the same shall be invested on real security in the said Province, or in Government securities, and the interest thereof

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shall be paid to the persons entitled to the rents and profits of the property in settlement.

70. In every memorandum of sale or other instrument executed by a trustee, as trustee only, and not as the person beneficially interested in the land thereby contracted to be transferred or otherwise dealt with, there shall be implied a covenant only that such trustee hath not at any time before the execution of such memorandum of sale or other instrument done, or knowingly suffered to be done, any act, matter, or thing, whereby or by means whereof the land therein referred to can or may be impeached, charged, encumbered, or in any manner prejudicially affected in title, estate, or otherwise howsoever.

71. Where any memorandum of sale or other instrument in accordance with the provisions of this Act, is executed by more parties than one, such implied covenants shall be construed to be several and not to bind the parties jointly, and in any declaration in an action for a supposed breach of any such covenants, the covenant alleged to be broken may be set forth, and it shall be lawful to allege that the party against whom such action is brought did so covenant precisely in the same manner as if such covenant had been expressed in words in such memorandum of sale or other instrument, any law or practice to the contrary notwithstanding.

72. That when the deceased owner shall by any instrument or covenant bind or have bound his heirs, the term "heirs" shall be construed to mean the person or several persons who by law shall be chargeable with the debts of such deceased owner.

73. In every case where any of the covenants or powers aforesaid would be implied by or in any woman if unmarried, the same shall be implied by or in her husband if she shall be married.

74. Every covenant which shall be implied by virtue of this Act shall have the same force and effect, and be enforced in the same manner as if it had been set out at length in the instrument wherein the same shall be implied.

75. Every covenant and power to be implied in any instrument by virtue of this Act may be negatived or modified by express declaration on the instrument, or endorsed therein.

76. No vendor of any land under the operation of this act shall have any equitable lien thereon by reason of the non-payment of the purchase-money, or any part of the purchase-money, for the same.

77. Except as hereinbefore provided in the case of right of purchase covenanted in a lease, no agreement for the sale, lease, or other dealing with any estate or interest in land under the operation of this Act to be performed in futuro, shall be entered

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in the register book; but any person claiming an interest in any such land under any such contract or agreement, or having any claim or interest adverse to any will may, by caveat in the form of the Schedule hereto marked P, or as near thereto as circumstances will permit, forbid the registration of any will or other instrument affecting such land, estate, or interest.

78. The proprietor of land under the operation of this Act, or any person registered as having estate or interest therein, may authorize and appoint any person to act for him, or on his behalf, in respect to the leasing of such land, or the sale or mortgage of his estate or interest therein, or otherwise lawfully to deal with such land, in accordance with the provisions of this Act, by executing a power in form of the Schedule hereto marked G, or as near thereto as circumstances will permit, which power shall contain the same description of such land as is contained in the grant, or existing certificate of title thereof, or such other description as may be sufficient to identify the said land, and shall set forth accurately the estate or interest of such proprietor in the said land, and shall specify the nature of the power intended to be conferred, the name and description of the person by whom, the places where, and the time within which it is to be exercised; and upon such power being brought to the Registrar-General, he shall enter the particulars of the same in the register book, and shall record upon such power a memorandum of the day and hour on which the said particulars were so entered, and shall authenticate such record by signing the same and affixing thereto his seal; and from and after the date of such entry in the register book, all acts lawfully done or performed by the person so appointed under authority of and within the limits prescribed in such power, shall have the same force and effect, and be equally binding on such proprietor, as if the said acts had been done or performed by such proprietor; and every such power bearing such endorsement, authenticated as aforesaid, shall be received in evidence as sufficient proof that the person to whom such power has been granted is duly authorized to make all contracts, to sign all instruments, and to perform all other lawful acts in accordance with the powers therein limited and appointed for the attainment of the objects therein specified, or any of them: Provided always, that nothing herein contained shall be interpreted to invalidate any power of attorney executed without the limits of the said Province, or prior to the passing of this Act, although such power may not be in accordance with the provisions of this Act.

79. The Registrar-General, upon the application of any registered proprietors of land under the operation of this Act, shall grant to such proprietor a registration abstract enabling

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him to sell, mortgage, or otherwise deal with his estate or interest in such land at any place without the limits of the said Province, which registration abstract shall be in the form in the Schedule hereto marked H, or as near to such form as circumstances will permit, and the Registrar-General shall at the same time enter in the register book a memorandum recording the issue of such registration abstract, and shall endorse on the grant, certificate of title, or other instrument evidencing or constituting the title of such applicant proprietor to such estate or interest a like memorandum recording the issue of such registration abstract, and from and after the issuing of any such registration abstract, no sale, mortgage, lease or other transaction transferring, encumbering, or in any way affecting the estate or interest in respect of which such registration abstract is issued shall be entered in the register book until such abstract shall have been surrendered to the Registrar-General to be cancelled, or the loss or destruction of such abstract proven to his satisfaction, or until the same shall have been revoked in manner hereinafter provided.

80. Whenever any sale, mortgage, or lease is intended to be transacted under any of such registration abstract, a memorandum of sale, bill of mortgage, or lease as the case may require, shall be prepared in duplicate in the forms for such case hereinbefore appointed and prescribed, or as near to such form as circumstances will permit, and shall be produced to some one of the persons hereinafter appointed as persons before whom the execution of instruments without the limits of the said Province may be proven, and record shall be made upon such registration abstract of the several particulars hereinbefore required to be entered in the register book by the Registrar-General in the case of a transfer, mortgage, or lease, as the case may be, made within the limits of the said Province, and upon such record being authenticated by the signature of such authorized person as aforesaid, such transfer, mortgage, or lease shall be as valid and binding to all intents as if the same had been made within the limits of the said Province, and recorded in the register book by the Registrar-General, and subject to the rules hereinafter for each such case prescribed, every person whose name shall have been so recorded as purchaser mortgagee, or lessee of such land upon such registration abstract, shall be held and taken to be registered as such, and shall have the same rights and powers, and be subject to the same liabilities as he would have had and been subject to if his name had been registered in the register book instead of on such abstract as proprietor, mortgagee, or lessee of such land or of such estate or interest therein.

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81. The following rules shall be observed as to powers of attorney and registration abstracts:

(1) The power shall be exercised in conformity with the directions contained therein;

(2) No sale, mortgage, or lease bona fide made thereunder shall be impeached by reason of the person by whom the power was given dying before the making of such sale, mortgage or lease;

(3) Whenever the power contains a specification of the place or places at which, and a limit of time within which, the sale is to be exercised, no sale, mortgage, or lease bona fide made to a purchaser, mortgagee, or lessee without notice shall be impeached by reason of the bankruptcy or insolvency of the person by whom the power was given;

(4) If sale be affected, there shall be delivered up to the Registrar-General the memorandum of sale by which the land or any estate or interest therein is contracted to be transferred, the registration abstract, and the grant, certificate of title, lease or other instrument of title; the Registrar-General shall enter in the register book a memorandum of the particulars of such sale, and of the cancelling of such abstract, and shall endorse on such memorandum, and also on the grant, certificate of title, lease or other instrument of title a memorandum of the date and hour on which such entry was made, and if a full estate in fee simple, in such land, or in any part thereof, shall have been passed by such memorandum of sale, he shall cancel the grant or certificate of title delivered up, and shall issue a certificate of title of such land, or of the sold portion thereof to the purchaser, and if part only be sold, he shall also issue a certificate of title of the unsold portion to the proprietor; and shall, before issuing the same, endorse on each of such certificates of title, a memorandum of the particulars of all unsatisfied mortgages or encumbrances appearing in the registry book, or on the registration abstract affecting the land included under each such certificate of title respectively;

(5) Every mortgage which is so endorsed as aforesaid on the registration abstract shall have priority over all bills of mortgages of the same estate executed subsequently to the date of the entry of the issuing of such abstract in the register book; and if there be more mortgages than one so endorsed, the respective mortgagees claiming thereunder shall, notwithstanding any express, implied, or constructive notice, be entitled one before the other according to the date at which a record of each instrument is endorsed on such abstract, and not according to the date of the bill of mortgage;

(6) The discharge and also the transfer of any mortgage, so endorsed on such abstract may be endorsed on such abstract

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by any person hereinbefore authorized to record a mortgage thereon upon the production of such evidence and the execution of such instruments as are hereinbefore required to be executed and produced to the Registrar on the entry of the discharge or transfer of a mortgage in the register book; and such endorsement, so made on such abstract, shall have the same effect and be as valid, to all intents, as if such transfer or discharge had been entered in the register book by the Registrar-General in manner hereinbefore provided.

(7) Upon proof, at any time, to the satisfaction of the Registrar-General that any power or registration abstract is lost, or so obliterated as to be useless, and that the powers thereby given have never been exercised, or if they have been exercised then upon proof of the several matters and things that have been done thereunder, it shall be lawful for the Registrar-General, with the sanction of the Lands Titles Commissioners, as circumstances may require, either to issue a new power or registration abstract, as the case may be, or to direct such entries to be made in the register book, or such other matter or thing to be done as might have been made or done if no such loss or obliteration had taken place.

(8) Upon the delivery of any abstract to the Registrar-General, he shall, after recording in the register book in such manner as to preserve its priority, the particulars of every unsatisfied mortgage registered thereon, cancel such abstract, and enter the fact of such cancellation in the register book; and shall also, by endorsement on the grant, or certificate of title, lease, or other instrument, evidencing the title of such proprietor to such land, note the particulars of every such unsatisfied mortgage, and of every such lease, and the cancellation of such certificate of mortgage, and every certificate so cancelled shall be void to all intents, and shall file in his office the duplicates of every memorandum of sale, bill of mortgage, lease or other instrument executed thereunder, which may for that purpose be delivered to him.

82. The registered owner for the time being of any land in respect of which a power of attorney has been issued may, by an instrument, under his hand, in the form Q in the Schedule hereto, or as near thereto as circumstances will permit, revoke such power; and if the holder of such power shall neglect or refuse to surrender the same to such owner, or his agent exhibiting such revocation order, duly certified by the Registrar-General, he shall be guilty of a misdemeanor, and on conviction thereof shall forfeit and pay a sum not exceeding One Hundred Pounds, unless it shall be made to appear to the satisfaction of the Court before whom the case may be tried, that the

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powers given therein had been exercised prior to the presentation of such revocation order.

83. After the presentation of such revocation order to the holder of such power, the said power shall, so far as concerns any mortgage or sale to be thereafter made, be deemed to be revoked and of no effect.

84. Whenever it is intended that partition should be made by copartners, joint tenants, or tenants in common, of any land under the operation of this Act, or of any estate or interest in such land, such copartners, joint tenants, or tenants in common, may execute a memorandum of sale, lease or other such instrument of transfer as in accordance with the provisions of this Act the nature of the estate or interest may require, purporting to sell, lease, or otherwise transfer, to each or any of such copartners, joint tenants, or tenants in common respectively, such part of the said land, or their estate or interest in such part of the said land as shall be expressed and described in such memorandum of sale, lease or instrument of transfer; and upon such memorandum of sale, lease, or other instrument being presented to the Registrar-General, he shall enter the particulars of the same in the register book, and proceed in other respects as is hereinbefore directed for the case of the transfer of a like estate or interest in land under the operation of this Act, and upon such entry being made in the register book, the estate or interest of such copartners, joint tenants, or tenants in common, in the particular piece of land described in such memorandum of sale, lease or other instrument, shall pass from such copartners, joint tenants, or tenants in common, and shall vest in the individual named and described as purchaser, lessee, or transferee, of the estate or interest of such copartners, joint tenants, or tenants in common, as set forth, limited, and described in such memorandum of sale, lease, or other instrument of transfer.

85. If the consent or direction of any person shall be requisite or necessary upon a sale or other disposition of land under the operation of this act, or any estate or interest therein, such consent or direction may be endorsed upon the memorandum of sale, or other instrument executed for the purpose of transferring, or otherwise dealing with such land, or estate or interest therein, in the words following, that is to say, "I consent hereto," which consent or direction, when signed by such consenting or directing party, and attested in manner hereinafter prescribed, shall have full validity and effect.

86. Every instrument signed by any married woman, as a vendor, mortgagor, or lessor, or otherwise, for the purpose of disposing of, releasing, surrendering, or extinguishing any estate, right, title, or interest in any land under the operation of this Act, if produced and acknowledged by her in manner pro-

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vided by the Ordinance of the Governor in Council of the said Province, No. 15 of 1845, intituled "An Ordinance to render effectual Conveyances by Married Women, and to declare the effect of certain Deeds relating to Dower," shall have the same effect and validity as is by this given to instruments of the like nature when signed by male persons of full age and sound mind, attested in manner hereinbefore prescribed.

87. If any person interested in any land under the operation of this Act, is by reason of infancy, lunacy, or other inability, incapable of making any declaration or doing anything required or permitted by this Act to be made or done by a proprietor in respect of registry transfer, or transmission, mortgage, or encumbrance of such land, or the release of the same from any mortgage or encumbrance, or the leasing, assigning, or in any other manner dealing with such land, then the guardian or committee, if any, of such incapable person, or, if there be none, any person appointed by any Court or Judge possessing jurisdiction in respect of the property of incapable persons, upon the petition of any person on behalf of such incapable person, or of any other person interested in the making such declaration, or doing such thing, may make such declaration, or a declaration as nearly corresponding thereto as circumstances permit, and do such thing in the name and on behalf of such incapable person; and all acts done by such substitute shall be as effectual as if done by the person for whom he is substituted.

88. The execution of any instrument made in accordance with the provisions of this Act, or the discharge of any mortgage or encumbrance, or the transfer or surrender of any lease, may be proved, if the parties executing the same be resident within ten miles of the Registry Office, then before the Registrar-General; if the parties executing the same be resident at a distance from the Registry Office greater than ten miles, then before the Registrar-General or a Justice of the Peace; if the said parties be resident in Great Britain, then by the Mayor or other Chief Officer of any Corporation, or before a Notary Public; if the said parties be resident in any British Possession, then before the Chief Justice, Judge of any Superior Court having jurisdiction in such Possession, or before the Governor, Government Resident, or Chief Secretary thereof; if the said parties be resident at any foreign place, then before the British Consular Office resident at such place; and a certificate of such proof, under the hand and seal of the Registrar-General, or of any such Justice of the Peace, Notary Public, Mayor or other Chief Officer, Chief Justice, Judge, Governor, Resident, Chief Secretary, or Consular Officer, as the case may be, shall be sufficient evidence that the execution of such instrument, had been duly proved.

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89. The execution of any such instrument, release, transfer, or surrender, may be proved before any such person as aforesaid, by the oath or solemn affirmation of the parties executing the same, or of a witness attesting the signing thereof; and if such witness shall answer in the affirmative, each of the questions following, that is to say—

Are you the witness who attested the signing of this instrument, and is the name or mark purporting to be your name or mark as such attesting witness your own handwriting?

Do you personally know-----, the person signing this instrument, and whose signature you attested?

Is the name purporting to be his signature his own handwriting, is he of sound mind, and did he freely and voluntarily sign the name?

Then the Registrar-General, Justice, or other person before whom such witness shall prove such signature as aforesaid, shall endorse upon such instrument a certificate in form of the Schedule hereto annexed marked R, or as near thereto as circumstances will permit; Provided also, that if any person signing any such instrument, transfer, release, or surrender, as aforesaid, as the maker thereof, shall be personally known to the Registrar-General, Justice, or other person as aforesaid, it shall be lawful for such person to attend and appear before such Registrar-General, Justice, or other person to whom he is personally known, and then and there acknowledge that he did freely and voluntarily sign such instrument, transfer, release, or surrender; and upon such acknowledgment, the Registrar-General, Justice, or other person, as the case may be, shall endorse on such instrument a certificate, in the form or to the effect of the Schedule hereto marked S, or as near thereto as circumstances will permit, and it shall not be necessary for such instrument to be proved by the attesting witness in manner aforesaid; Provided also that such questions as aforesaid may be varied as circumstances shall or may require, in case any person shall sign such instrument by his mark; Provided also, that, on the signing of any such instrument by any married woman, and the acknowledgment thereof by her in manner mentioned or referred to in this act, no further or other proof or acknowledgment shall be requisite or necessary.

90. Every such Justice as aforesaid, sitting in open Court, shall be, and he is hereby required to administer the oath, or take the solemn affirmation, or the acknowledgment, of any person attending before him for the purpose of proving or acknowledging any such instrument as aforesaid.

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91. It shall not be lawful for any person to institute or prosecute any action of ejectment for the recovery of land under the operation of this Act, against the registered proprietor, save and except only in the case of a mortgagee against his mortgagor, an encumbrancee against his encumbrancer, or a lessor against his lessee, in default, under the terms, conditions, or covenants of a bill of mortgage, bill of encumbrance, bill of trust, or lease, as the case may be, executed and registered in accordance with the provisions of this Act, or in the case of any person duly authorized by any Court having jurisdiction in cases of bankruptcy or insolvency, against a bankrupt or insolvent, or in case the registered proprietor has obtained such land by fraud or misrepresentation.

92. Any person who shall, by the decree of any Court having jurisdiction in such case, be declared to be the lawful heir to any land under the operation of this Act or any person who shall by any such decree be declared to have been deprived of an estate or interest in such land, through the entry in the register book of any memorandum of sale or other instrument affecting such land, made or procured to be made by fraud, error, misrepresentation, oversight, or deceit, may bring and prosecute an action at law in the Supreme Court for the recovery of damages against the person who may, by fraud or other means as aforesaid, have become registered as proprietor of such land; and the Court or Jury before whom such action is tried shall, if such person obtains a verdict in his favor, find damages against the person so registered as proprietor through fraud, or error, or other means aforesaid, for such sum of money as the Court or Jury may think fit, not exceeding the value of such land at the time when such person did so wrongfully, or in error become registered as proprietor of the same, together with interest on the amount of such value, computed at Six Pounds in the One Hundred Pounds per annum, from the date when such person so became wrongfully, or in error, registered as proprietor.

93. In case the person against whom damages shall in any such case be awarded, shall have been so registered as proprietor, through error or misconception, and not through fraud, misrepresentation, or deception, it shall be lawful for such last-named person, in lieu of paying such sums of money so awarded as damages (if he shall so elect and is in a position so to do), to transfer such land to the person who shall have obtained such verdict, clear of any mortgage, encumbrance, or any lien or liability of such nature or amount as to reduce the value of the said land, estate, or interest below the amount so awarded as damages; and the memorandum of sale, or other instrument evidencing transfer of such land, estate, or interest to the per-

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son who shall have obtained such verdict, duly executed and registered in accordance with the provisions of this Act, shall be received in any Court of Law or Equity as a sufficient discharge for the liability on account of the sum of money so awarded as damages.

94. If it shall be made to appear, to the satisfaction of the Court before whom such action shall be tried, that any person, at the time then being registered as proprietor in respect of such estate or interest, has been so registered through fraud or misrepresentation, or in any manner otherwise than as purchaser, or mortgagee for bona fide valuable consideration, or by transfer, or transmission from or through a purchaser or mortgagee for bona fide valuable consideration, it shall be lawful for such Court to direct the Registrar-General to cancel the entry in the register book recording the proprietorship of the person who shall by such fraud or misrepresentation have been so registered, together with all subsequent entries therein relating to the same estate or interest, and the Registrar-General shall obey such order, and the estate or interest referred to in such order shall thereupon revert to and vest in the persons in whom (having regard to intervening circumstances, if any) the same would have vested had no such entries been so made in the register book.

95. If, at the date of making such decree as aforesaid, the person who shall, by fraud, misrepresentation, or error, have been registered as proprietor of the estate or interest therein referred to, shall still be registered as proprietor of the same estate or of any portion thereof, notice of such decree, signed by the Master of the Supreme Court, or by the Judge by whom such decree was made, served upon the Registrar-General, shall operate as a destringas, and the Registrar-General, upon the receipt of such notice, and until the damages awarded shall be paid or satisfied, shall abstain from recording on the register book any transfer, mortgage, or other transaction, affecting the same estate or interest, except for the purpose of satisfying such award in manner hereinbefore provided.

96. In case the person against whom such verdict shall have been obtained shall fail to pay, within reasonable time, the amount of damages so awarded, or to convey the estate or interest to the person who shall have obtained such verdict, the amount of such award may be levied by distress upon the goods of such person, or he may be attached, and lodged in the common gaol in Adelaide until such amount be paid or satisfied in manner aforesaid; and, in case of a return of nulla bona, or if the amount recovered by such distress shall not suffice to cover the amount of damages so awarded, together with all costs of suit, the Registrar-General shall address to the Treasurer of

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the said Province, a requisition for the payment of the amount so awarded, or of the balance thereof, and the said Treasurer upon receipt of such requisition, and of a warrant under the hand of the Governor, countersigned by the Chief Secretary of the said Province, shall pay such amount, and shall charge the same to the account of the assurance fund hereinbefore described.

97. No action of ejectment, or for recovery of damages, shall be in any case instituted against any registered proprietor after the expiration of the time within which it shall be lawful, or any law for the time being in force in the said Province, to bring or commence an action for ejectment for the recovery of any land.

98. If any certificate of title, or other instrument affecting land, under the operation of this Act, or any entry, memorandum, or endorsement, in or upon any such instrument, shall be obtained from or issued by the Registrar-General through or by means of fraud, error, misrepresentation, oversight, or deceit, it shall be lawful for the said Registrar-General, by summons under the hand of a Judge of the Supreme Court, to be issued to such Registrar-General upon verbal application made by him, to summon the person to whom such certificate, or other instrument, shall have been issued, to surrender and yield up such certificate, or other instrument to such Registrar-General; and if such person shall neglect or refuse to surrender and yield up such certificate, or other instrument, it shall be lawful for the said Court, or any Judge thereof, upon proof that such summons had been duly served, and upon the like application of the Registrar-General, to issue an attachment against such person, and commit him to the common gaol at Adelaide, until such certificate, or other instrument, be surrendered and yielded up; and the Registrar-General shall give public notice, by advertisement, published once in each of three successive weeks in the South Australian Government Gazette, and at least one newspaper published in the City of Adelaide, that such certificate, or other instrument, or such entry, memorandum, or endorsement, had been obtained or issued in manner as aforesaid, and shall declare such certificate, or other instrument, or such entry, memorandum, or endorsement, to be void, and of no effect whatever; whereupon the same shall become void and of no effect; Provided always, that nothing herein contained shall be held to operate in any such manner as to subject to impeachment or to defeat the title of any person who, before the issue of such summons as aforesaid, shall, upon payment of bona fide valuable consideration, have become registered as proprietor in respect to the estate or interest referred to in such certificate, entry, memorandum, or endorsement.

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99. In the event of the grant or certificate of title of any land registered under this Act being lost, mislaid, or destroyed, the proprietor of such land, together with other persons, if any, having knowledge of the circumstances, may make a declaration before the Registrar-General, stating the facts of the case, the names and descriptions of the registered owners, and the particulars of all mortgages, encumbrances, or other matters affecting such land and the title thereto, to the best of declarant's knowledge and belief; and the Registrar-General, if satisfied as to the truth of such declaration, and the bona fides of the transaction, may, with the consent of the Lands Titles Commissioners, issue to such applicant a provisional certificate of title of such land, which provisional certificate shall contain an exact copy of the original grant, or certificate of title, bound up in the register book, and of every memorandum and endorsement thereon at the time appearing, and shall also contain a statement of the circumstances under which such provisional certificate is issued; and the Registrar-General shall, at the same time, enter in the register book notice of the issuing of such provisional certificate, and the date thereof, and the circumstances under which it was issued; and such provisional certificate shall be available for all purposes and uses for which the grant, or certificate of title, so lost or mislaid would have been available, and as valid to all intents as such lost grant or certificate.

100. The Registrar-General, upon receipt of any caveat in accordance with the provisions of this Act, shall cause the same to be published in the Government Gazette of the said Province, and also in at least one newspaper published in the City of Adelaide, three several times in each of three successive weeks, at the expense of the person serving such caveat, and in case such person shall refuse to pay the expense thereof, the Registrar-General shall not be bound or obliged to receive such caveat.

101. The Registrar-General shall give notice of the receipt of such caveat to every person registered as proprietor in respect to the estate or interest referred to in such caveat, and to every person presenting for purpose of registration any instrument relating to such estate or interest, and such registered proprietor, or other person claiming estate or interest in the same land, may, if he think fit, summon the person signing such caveat to attend before the Judges of the Supreme Court of the said Province, or one of them, to show cause why such caveat should not be withdrawn; and it shall be lawful for the said Court, or a Judge thereof, upon proof that such last-mentioned person has been summoned, to make such order in the premises, either *ex parte* or otherwise, as to the said Court or Judge shall seem fit.

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102. Within three calendar months from the entering of such caveat, the person entering the same shall take proceedings to establish his claim, and such proceedings shall be by way of petition to the Supreme Court, which shall be filed on oath, and shall contain, as concisely as may be, a statement of the material facts on which the petitioner relies, such statement to be divided into paragraphs, numbered consecutively, and each paragraph shall contain, as nearly as may be, a separate and distinct allegation, and shall state specifically what estate, lien, or charge the petitioner claims, and the said Court, upon receipt of such petition, shall issue an order appointing a time for hearing the same.

103. The petitioner shall cause a copy of such petition and of the order for hearing to be served upon the registered proprietor of the estate or interest in respect to which such caveat is lodged, or upon the person applying to have land brought under the operation of this Act as the case may be, fourteen days at least before the day appointed for the hearing of the said petition.

104. On the day of hearing, the claimant is personally, or by counsel, to show cause in Court if he can, and if necessary by affidavit, why the matters claimed by such petitioner should not be ordered.

105. If the claimant shall not appear on the day appointed for the hearing, the Court may, upon due proof of the service of such petition and order, make such order, in the absence of the claimant, either for the establishment of the rights of the petitioner, or as the nature and circumstances of the case may require, as to such Court may seem meet.

106. On the day appointed for the hearing of the petition, and on hearing the same, and the affidavits, if any, filed in support thereof, and hearing what may be alleged on behalf of the claimant, the Court may, if it shall think fit, make an order establishing the right of the petitioner, or directing any inquiries to be made, or other proceedings taken, for the purpose of ascertaining the rights of the parties, or may dismiss the petition.

107. The Supreme Court may, if it shall think fit, direct any question of fact brought before it to be decided before a Judge thereof; and for that purpose may direct an issue to be tried, wherein the petitioner shall be plaintiff, and the claimant shall be defendant; and the said Court shall direct when and where the trial of such issue shall take place, and shall also require the claimant and petitioner severally to name an attorney to act on his behalf; and the Court may also direct the parties to produce all deeds, books, papers, and writings, in their custody or power, on a day to be named by the Court, and each party shall have liberty to inspect the same, and take copies thereof, at

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their own expense; and such of them as either party shall give notice to have produced at the trial, shall be produced accordingly; and, in case the parties differ upon the question or questions to be tried, the Court may either settle the same, or otherwise refer it to the Lands Titles Commissioners.

108. If the Court shall find that the petitioner is entitled to all or some of the matters claimed by him, the order of the Court shall declare what is the estate, interest, lien, or claim to which the petitioner is entitled, and shall direct such order to be served upon the Registrar-General, who shall obey the same or act in accordance therewith.

109. Every order of the Court shall have such and the like effect as a decree or decretal order of the Court made in a suit commenced by bill, and duly prosecuted to a hearing, according to the present practice of the Equitable Jurisdiction of the Court.

110. If, at the hearing of such petition, it shall appear to the Court that, for the purposes of justice, it is necessary or expedient that a bill should be filed, the Court may order or authorize such bill to be filed subject to such terms as to costs or otherwise as may be thought proper.

111. The Court shall have power in all cases to order the payment of the costs occasioned by entering the caveat or incidental thereto, to be paid by or to the petitioner, as the case may require and as the Court may think fit.

112. The procedure and practice in the matter of a petition presented under this Act shall, unless otherwise provided, be regulated by the procedure and practice of the Equitable Jurisdiction of the said Supreme Court in a claim filed under an Act passed in the year of our Lord one thousand eight hundred and fifty-three, and being numbered 14 of that year, intituled "An Act to amend the practice and proceeding in the Equitable Jurisdiction of the Supreme Court of South Australia."

113. From and after the passing of this Act all public maps delineating the Waste Lands of the Crown in the said Province for the purpose of sale, shall be made in duplicate, and the Surveyor-General shall sign each duplicate, and shall certify the accuracy of the same, and such duplicates of such maps shall be deposited in the Registry Office, and whenever, in any instrument relating to land brought under the operation of this Act, and executed subsequent to the passing thereof, reference is made to the public maps of the said Province deposited in the office of the Surveyor-General, such reference shall be interpreted and taken to apply equally and with the same force and effect, and for the same purposes, to either of such duplicates.

114. It shall be lawful for any proprietor, subdividing any land under the operation of this Act, for the purpose of selling

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the same in allotments as a township, to deposit with the Registrar-General a map of such township provided that such map shall be on a scale of not less than one inch to the chain, and shall exhibit, distinctly delineated, all roads, streets, passages, thoroughfares, squares, or reserves, appropriated or set apart for public use, and also all allotments into which the said land may be divided, marked with distinct numbers or symbols, and the person depositing such map shall sign the same, and shall certify the accuracy thereof by declaration before the Registrar-General, or a Justice of the Peace.

115. It shall be lawful for the Registrar-General, if he shall think fit, to require the proprietor applying to have any land brought under the operation of this Act, or desiring to transfer or lease the same, or any portion thereof, to deposit, at the Registry Office, a map or plan of such land, and if the said land, or the portion thereof proposed to be transferred or leased, shall be of less area than one statute acre, then such map or plan shall be on a scale not less than one inch to the chain; and if such land, or the portion thereof, about to be sold or leased, shall be of greater area than one statute acre, then such map or plan shall be upon a scale not less than one inch to six chains, and such proprietor shall sign such map and shall declare to the accuracy of the same before the Registrar-General, or a Justice of the Peace; and if such proprietor shall neglect or refuse to comply with such requirement, it shall not be incumbent on the Registrar-General to proceed with the bringing of such land under the operation of this Act, or with the registration of such transfer or lease; Provided always, that subsequent subdivisions of the same land may be delineated on the map or plan of the same, so deposited, if such map be upon a sufficient scale, in accordance with the provisions herein contained, and such proprietor shall certify the correctness of the delineation of each such subdivision, by declaration in manner prescribed for the case of the deposit of an original map.

116. Any person may, upon payment of a fee specified in Schedule T hereto, have access to the register book for the purpose of inspection at any reasonable time during the hours and upon the days appointed for search.

117. The Registrar-General, upon payment of such reasonable sum as may be appointed by any regulation made by him for such case, with sanction of the Governor, shall furnish to any person applying at a reasonable time for the same, a certified copy of any instrument affecting or relating to land registered under the provisions of this Act, and every such certified copy signed by him and sealed with his seal, shall be received in evidence in any Court of Justice, or before any person having by law, or by consent of parties, authority to receive evidence

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as prima facie proof of all the matters contained or recited in or endorsed on the original instrument, and the production of any such certified copy, so signed and sealed, shall be as effectual in evidence to all intents as the production of the original.

118. The Registrar-General shall not be liable to damages or otherwise for any loss accruing to any person by reason of any act done or default made by him in his character of Registrar-General, unless the same has happened through his neglect or wilful act.

119. The Registrar-General shall keep a correct account of all such sums of money as shall be received by him in accordance with the provisions of this Act, and shall pay the same into the Public Treasury of the said Province at such times, and shall render accounts of the same to such persons, and in such manner as may be directed in any regulations that may for that purpose be prescribed by the Governor-in-Chief of the said Province, by and with the advice of the Executive Council thereof; and the Registrar-General shall address to the said Treasurer requisitions to pay moneys received by him, in trust or otherwise, on account of absent mortgagees or other persons entitled in accordance with the provisions of this Act; which requisitions, when proved and audited in manner directed, by any such regulations framed as aforesaid at the time being in force in the said Province, and accompanied by warrant for payment of the same under the hand of the Governor, countersigned by the Chief Secretary thereof, the said Treasurer shall be bound to obey, and all fines and fees received under the provisions of this Act, except fees payable to the Lands Titles Commissioners for the bringing of land under the operation of this Act, shall be carried to account by the said Treasurer as General Revenue.

120. Any person who shall wilfully or knowingly, by fraud or misrepresentation, make, or cause, or obtain to be made in the register book, any entry which might in any way affect the right, title, estate, or interest of himself, or of any other person, in any land under the operation of this Act, or who shall wilfully or knowingly, by fraud or misrepresentation, procure from the Registrar-General any certificate of title, registration abstract, or other instrument evidencing or relating to title to, or estate or interest in land under the operation of this Act, or shall cause or procure to be made any entry, certificate, memorandum, or endorsement by this Act prescribed to be made in or upon any such certificate, abstract, or other instrument by the Registrar-General, or other authorized person, or who shall use or utter any such certificate, abstract, or other instrument, knowing the same to be counterfeited, forged, or altered, or to have been obtained by fraud or misrepresentation, or to con-

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tain or bear any entry, memorandum, certificate, or endorsement as aforesaid, forged, counterfeited, or altered, or obtained by fraud or misrepresentation, and who shall be thereof lawfully convicted, shall be deemed guilty of felony, and be sentenced to be imprisoned for any period not exceeding four years, and to be kept to hard labor or solitary confinement for any part of the period aforesaid; and if any person shall wilfully or knowingly make a false oath or affirmation touching or concerning any matter or procedure made or done in pursuance of this Act, and be thereof lawfully convicted, such person shall be deemed guilty of perjury, and be imprisoned for the period, and in the manner aforesaid, and, in addition to such punishment, any person damnified or suffering loss by any such fraud, misrepresentation, forgery, counterfeit, alteration, use, or utterance, of any such certificate, abstract, or other instrument, as aforesaid, or by the making of any such false oath or affirmation, shall have a right of action against, and be entitled to recover damages from, the person guilty of such fraud, misrepresentation, forgery, counterfeit, alteration, use, or utterance, or making such false oath or affirmation, the amount of all damages he may have sustained thereby, with full costs of suit, as hereinbefore provided.

121. Unless in any case herein otherwise expressly provided, all offences against the provisions of this Act may be prosecuted, and all penalties or sums of money imposed or declared to be due or owing by or under the provisions of the same, may be sued for and recovered in the name of the Attorney-General, or of the Registrar-General, before any Court in the said Province, having jurisdiction for punishment of offences of the like nature, or for the recovery of penalties or sums of money of the like amount.

122. It shall be lawful for the Registrar to charge and receive such fees as shall be appointed by the Governor of the said Province, by and with the consent of the Executive Council, not in any case exceeding the several fees specified in the Schedule hereto marked T.

123. This Act shall commence and take effect from and after the first day of July, one thousand eight hundred and fifty-eight.

Schedules Referred To.

SCHEDULE A.

SOUTH (ROYAL ARMS) AUSTRALIA.

Certificate of Title.

A. B., of (here insert description, and if certificate be issued pursuant to any sale, reference to memorandum of sale, reciting particulars) is now seised of an estate (here state whether in fee simple) subject nevertheless to such encumbrances, liens, and interests, as are notified by memorandum endorsed hereon, in that piece of land situated in the (County, Hundred, or Township) of-----bounded on the (here set forth boundaries, in chains, links, or feet), containing (here state area), be the same a little more or less (exclusive of roads intersecting the same, if any), with right of way over (state rights of way, and other privileges, or easements, if any); plan of which piece of land is delineated in (margin, or in map No.-----, deposited in Registry Office), which said piece of land is (or is part of) the (Country Section or Town allotment), marked-----, delineated in the public map of the said (County, Hundred, or Township), deposited in the office of the Surveyor-General, which was originally granted the-----day of-----, under the hand and seal of-----, Governor (or Resident Commissioner) of the said Province, to C. D., of (here insert description), as appears by (land grant, former certificate, or other instrument of title, describing them), now delivered up and cancelled.

In witness whereof, I have hereunto signed my name, and affixed my seal, this-----day of-----.

Registrar-General. (L. S.)

Signed, sealed, and delivered, in presence of-----, the-----day of-----.

SCHEDULE B.

SOUTH AUSTRALIA.

Memorandum of Sale.

I, A. B., being seised of an estate (here state nature of the estate or interest, whether in fee simple or life estate, or of a greater or less description than a life estate), subject, however, to such encumbrances, liens, and interests, as are notified by memorandum endorsed hereon, in that piece of land situated in the (County, Hundred or Township) of-----,

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bounded on the (here set forth boundaries, in chains, links, or feet), containing (here state area), be the same a little more or less (exclusive of roads intersecting the same, if any), with right of way over (here state rights of way, privileges, or easements intended to be conveyed); plan of which piece of land is delineated in (margin, or in map No.-----, deposited in the Registry Office), which said piece of land is (or is part of) the (Country Section or Town allotment), marked-----, delineated in the public map of the said (County, Hundred or Township), deposited in the office of the Surveyor-General, which was originally granted the-----day of----- under the hand and seal of-----, Governor (or Resident Commissioner) of the said Province, to C. D., of (insert description), in consideration of the sum of £-----, paid to me by E. F., of (here insert description), the receipt of which sum I hereby acknowledge, do hereby transfer to the said E. F., (all my estate or interest, or a lesser estate or interest, describing such lesser estate) in the said piece of land. In witness whereof I have hereunto subscribed my name this-----day of-----.

Signed on the day above-named, by the said A. B., in presence of G. H.

SCHEDULE C. SOUTH AUSTRALIA.

Lease.

I, A. B., being seised of an estate (here state nature of the estate or interest, whether in fee simple or life estate, or of a greater or less description than a life estate), subject, however, to such incumbrances, liens, and interests as are notified by memorandum endorsed hereon, in that piece of land situated in the (County, Hundred or Township), of-----, bounded on the (here set forth boundaries in chains, links, or feet), containing (here state area), be the same a little more or less (exclusive of roads intersecting the same, if any), with right of way over (here state rights of way, privileges, or easements intended to be conveyed), plan of which piece of land is delineated in (margin hereof, or in map No.-----, deposited in the Registry Office), which said piece of land is (or is part of), the (County, Section or Town allotment), marked-----, delineated in the public map of the said (County, Hundred, or Township), deposited in the office of the Surveyor-General, which was originally granted the-----day of-----, under the hand and seal of-----, Governor or Resident Commissioner of the said Province, to C. D., of (insert description), do hereby lease to E. F., of (here insert de-

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scription), all the said lands, subject to the following covenants, conditions and restrictions (here set forth all special covenants, if any, and state what covenants declared by "Real Property Act" to be implied against lessor and lessee respectively are intended to be barred or modified and in what manner), to be held by him, the said E. F., as tenant, for the space of-----years, at the yearly rental of £-----, payable (here insert terms of payment of rent).

I, E. F., of (here insert description), do hereby accept this lease of the above described lands to be held by me, as tenant, for the term, and subject to the conditions, restrictions, and covenants above set forth.

Dated this-----day of-----.

Signed by the above-named A. B., as lessor, and by the above-named E. F. as lessee, this-----day of-----, in presence of X. Y.

(Signed)

A. B., Lessor.

E. F., Lessee.

SCHEDULE D.

SOUTH AUSTRALIA.

Bill of Mortgage.

I, A. B., being seised of an estate (here state nature of the estate or interest, whether in fee simple or life estate, or of a greater or less description than a life estate), subject, however, to such incumbrances, liens, and interests as are notified by memoranda endorsed hereon, in that piece of land situated in the (County, Hundred or Township) of-----, bounded on the (here set forth boundaries, in chains, links, or feet), containing (here state area), be the same a little more or less (exclusive of roads intersecting the same, if any), with right of way over (here state rights of ways, privileges, or easements appertaining); plan of which piece of land is delineated in (margin hereof, or in map No.-----, deposited in the Registry Office), which said piece of land is (or is part of) the (County Section or Town allotment) marked-----, delineated in the public map of the said (County, Hundred, or Township), deposited in the office of the Surveyor-General, which was originally granted the----- day of-----, under the hand and seal of-----, (Governor or Resident Commissioner) of the said Province, to C. D., of (insert description).

In consideration of the sum of £----- this day lent to me by E. F., of (here insert description), the receipt of which sum I hereby acknowledge, do hereby covenant with the said E. F. that I will pay to him, the said E. F., the above sum of £-----

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on the-----day of----- Secondly, that I will pay interest on the said sum at the rate of £----- by the £100, in the year, by equal payments, on the-----day of----- and on the-----day of-----in every year. Thirdly (here set forth special covenants, if any are intended, and state what covenants declared by "Real Property Act" to be implied in mortgages are intended to be barred or modified; and if so, in what manner.)

And for the better securing to the said E. F., the repayment in manner aforesaid of the said principal sum and interest, I hereby mortgage to the said E. F. all my estate and interest in the said land above described.

In witness whereof, I have hereto signed my name this-----day of-----.

A. B., Mortgagor. Accepted, E. F., Mortgagee.

Signed by the above-named A. B. as mortgagor, and by the above-named E. F. as mortgagee, this-----day of-----, in presence of G. H.

SCHEDULE E.

SOUTH AUSTRALIA.

Bill of Encumbrance.

I, A. B., being seised of an estate (here state nature of the estate or interest, whether in fee simple or life estate, or of a greater or less description than a life estate), subject, however, to such encumbrances, liens, and interests, as are notified by memoranda endorsed hereon, in that piece of land situated in the (County, Hundred or Township) of-----, bounded on the (here set forth the boundaries in chains, links, or feet), containing (here state the area), be the same a little more or less, (exclusive of roads intersecting the same, if any), with rights of way over (here state rights of way, privileges, or easements appertaining), plan of which piece of land is delineated in (margin hereof, or in map No.-----, deposited in the Registry Office) which said piece of land is (or is part of) the (County Section or Town allotment) marked-----, delineated in the public map of the said (County, Hundred, or Township) deposited in the office of the Surveyor-General, which was originally granted the-----day of-----, under the hand and seal of-----, Governor (or Resident Commissioner) of the said Province, to C. D., of (insert description), and desiring to render the said land available for the purpose of securing to and for the use and benefit of E. F., (here state the particulars of the annuity or sum of money desired to be secured, the times when, and the restrictions, limitations, conditions, and contingencies under which it is to be

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payable, and the particulars of any reversions or remainders desired to be secured or appointed), do therefore set over and appoint all my estate in the said land to be encumbered to the extent and liable for the payment of the above specified sums in manner and subject to the conditions, restrictions, and contingencies, reversions, and remainders above specified.

In witness whereof I have hereunto subscribed my name this
-----day of-----.

(Signed)

A. B.

Signed by the above-named A. B. in the presence of X. Y.

SCHEDULE F. **SOUTH AUSTRALIA.**

Bill of Trust.

I, A. B., being seised of an estate (here state nature of the estate or interest, whether in fee simple or life estate, or of a greater or less description than a life estate), subject, however, to such encumbrances, liens, and interests, as are notified by memorandum endorsed hereon, in that piece of land situated in the (County, Hundred or Township) of-----, bounded on the (here set forth boundaries, in chains, links, or feet), containing (here state area), be the same a little more or less (exclusive of roads intersecting the same, if any), with right of way over (here state rights of way, privileges, or easements appertaining); plan of which piece of land is delineated in (margin, or in map No.-----, deposited in the Registry Office). Which said piece of land is (or is part of) the (Country Section or Town allotment) marked-----, delineated in the public map of the said (County, Hundred, or Township), deposited in the office of the Surveyor-General, which was originally granted the-----day of-----, under the hand and seal of-----, Governor (or Resident Commissioner) of the said Province to C. D., of (insert description), desire to invest all my estate and interest in the above described land (or a lesser estate in the said lands, specifying the nature and limitations of such lesser estate and all conditions, restrictions, limitations, and contingencies, reversions, and remainders, to which it is desired to subject the same) in trust for the uses and benefit of C. D. of-----and do therefore transfer, set over, and appoint all my estate and interest in the said lands (or so much of my estate and interest in the same as is above limited and specified) to E. F. and G. H. as trustees, to have and to hold the said estate and interest, in trust, for the uses and benefit of the said C. D., subject to the conditions, limitations, restrictions, and contingencies, reversions, and remainders above set forth and specified.

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In witness whereof I have hereunto subscribed my name and affixed my seal, this-----day of-----.

A. B.

I accept the above trust.

E. F.

G. H.

Signed by the above-named A. B. as proprietor, and by the above-named E. F. and G. H. as trustees, this-----day of-----, in presence of X. Y.

SCHEDULE G.

SOUTH AUSTRALIA.

Power of Attorney.

I, A. B., being seised of an estate (here state nature of the estate or interest, whether in fee simple or life estate, or of a greater or less description than a life estate), subject, however, to such incumbrances, liens, and interests as are notified by memorandum endorsed hereon, in that piece of land situated in the (County, Hundred or Township), of-----, bounded on the (here set forth boundaries in chains, links, or feet), containing (here state area), be the same a little more or less (exclusive of roads intersecting the same, if any), with right of way over (here state rights of way, privileges, or easements appertaining), plan of which piece of land is delineated in (margin hereof, or in map No.-----, deposited in the Registry Office, which said piece of land is (or is part of), the (Country Section or Town allotment), marked-----, delineated in the public map of the said (County, Hundred, or Township), deposited in the office of the Surveyor-General, which was originally granted the-----day of-----, under the hand and seal of-----, Governor (or Resident Commissioner) of the said Province, to C. D. of (insert description), do hereby appoint C. D. attorney, on my behalf to (here state the nature and extent of the powers intended to be conferred, as whether to sell, lease, mortgage, etc.), the above described lands (or my estate and interest in the above described lands), subject, nevertheless, to the restrictions and limitations declared and set forth at foot hereof, and to execute all such instruments, and do all such acts, matters, and things as may be necessary for carrying out the powers hereby given, and for the recovery of all rents and sums of money that may become or are now due or owing to me in respect of the said lands, and for the enforcement of all contracts, covenants, or conditions binding upon any lessee or occupier of the said lands, or upon any other person in respect of the same and for the taking

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and maintaining possession of the said lands, and for protecting the same from waste, damage, or trespass.

I declare the above lands (or my estate or interest in the above lands), shall not be sold for less than £----- or unless upon the following conditions (here insert conditions, if any, to be imposed). I declare the amount of money to be raised by mortgage on the security of the said lands under this power shall not exceed £-----, or be less than £-----, and that the rate of interest at which the same is raised shall not exceed £----- for every year £100 by the year.

I declare the above land shall not be leased for any term of years exceeding-----, or at a less rent than £-----, or unless subject to the following covenants and restrictions (here insert conditions, such as whether right of purchase may be given, and at what price, &c. &c.).

I declare that this power shall not be exercised after the expiration of-----from the date hereof.

In witness whereof I have hereunto subscribed my name this -----day of-----

Signed by the above-named A. B. this-----day of -----in presence of X. Y.

SCHEDULE H. SOUTH AUSTRALIA. Registration Abstract.

I, A. B., being seised of an estate (here state nature of the estate or interest, whether in fee simple or life estate, or of a greater or less description than a life estate), subject, however, to such encumbrances, liens, and interests, as are notified by memoranda endorsed hereon, in that piece of land situated in the (County, Hundred or Township) of-----, bounded on the (here set forth the boundaries in chains, links, or feet), containing (here state the area), be the same a little more or less, (exclusive of roads intersecting the same, if any), with rights of way over (here state rights of way, privileges, or easements intended or appertaining), plan of which piece of land is delineated in (margin, or in map No.-----, deposited in the Registry Office), which said piece of land is (or is part of) the (Country Section or Town allotment) marked-----, delineated in the public map of the said (County, Hundred, or Township) deposited in the office of the Surveyor-General, which was originally granted the-----day of-----under the hand and seal of-----, Governor (or Resident Commissioner) of the said Province, to C. D. of (insert description), request that a registration abstract of my title to the said lands may be granted, enabling me to sell, lease,

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or otherwise deal with the same at places without the limits of the said Province.

(Signed)

A. B.

To the Registrar-General.

Signed by the above-named A. B. this_____day of _____in presence of X. Y.

I, Registrar-General of the Province of South Australia, do hereby certify that the above particulars relating to the above described land and to the estate and interest therein of A. B., whose signature is above subscribed are correct as appears by entries recorded in the register book of the said Province, Fo. _____, Vol. No._____. Pursuant, therefore, to the above application and by virtue of powers in me vested by Act of the Legislature of the said Province, intituled "The Real Property Act." This registration abstract is issued for the purpose of enabling the said A. B. to deal with the said lands at places without the limits of the said Province.

This abstract shall continue in force from the date thereof to the_____day of_____unless sooner delivered up.

In witness whereof, I have hereunto signed my name and append my seal this_____day of_____.

Registrar-General.

Signed, sealed, and delivered, the_____day of_____in the presence of X. Y.

SCHEDULE I.

SOUTH AUSTRALIA.

Application for Lands to be Brought Under Operation of Act No._____of_____.

I, A. B., of_____do declare (that I am), or (on behalf of_____of_____, that he is)

(L. S.) seised in possession of an estate (here state the description of estate, whether in fee simple or a lesser estate, or as trustee, or held in trust for uses) in all that piece of land situated in (here state the situation) bounded (here state the boundaries, and the length of each line of boundary, in chains and links, or in feet), containing (here state area), be the same a little more or less, (exclusive of roads intersecting the same, if any) with (here state rights of way and other privileges or easements appertaining), plan of which piece of land is (delineated in margin hereof, or in map No._____, deposited in the Registry Office) which piece of land is (the town allotment or country section, or is part of the town allotment or country section) originally granted to_____of_____by land grant under the hand and seal of_____, formerly Governor

ORIGINAL TORRENS ACT

(or Resident Commissioner) of the Province of South Australia. Dated the _____ day of _____, numbered in the plan of the (district, or township, or county) of _____, as delineated on the public maps of the Province deposited in the Survey Office in Adelaide; And I do further declare, that I am not aware of any mortgage, encumbrance, or claim affecting the said lands, or that any person hath any claim, estate, or interest in the said lands, at law or in equity, in possession or in expectancy, other than is set forth and stated as follows, that is to say (here state particulars of all unsatisfied mortgages, encumbrances, claims, or interests, if any), and I make this solemn declaration conscientiously, believing the same to be true.

Dated at _____, this _____ day of _____, 18____.

Made and subscribed by the above-named _____, this _____ day of _____, in the presence of me, _____, Registrar-General or Justice of the Peace.

I, A. B., the above declarant, do hereby apply to have the piece of land described in the above declaration brought under the operation of Act No. _____ of 18____.

Dated at _____ this _____ day of _____, 18____. A. B.

Witness to signature: C. D.

SCHEDULE J.

SOUTH AUSTRALIA.

Notice of Receipt of Application for Lands to Be Brought Under Operation of Act No. _____ of _____ or for the Registration of Transmission.

Whereas _____ of _____ hath made and subscribed a declaration before (Registrar-General or Justice of the Peace) setting forth (L. S.) (that he is, or on behalf of _____ that he is) seized of an estate in (here recite the particulars from declaration), and hath made application to have the said lands brought under the operation of Act of Council No. _____ of 18____, intituled the Real Property Act: Notice is hereby given that, unless within the space of _____ from the date hereof, caveat be lodged with me by some person having estate or interest in the said lands, or by some person duly authorized on behalf of a person having estate or interest therein, I will proceed, as by law directed, to bring the said piece of land under the operation of the said Act.

Dated this _____ day of _____ at the Registry Office, Adelaide, South Australia.

(Signed)

Registrar-General.

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SCHEDULE K.

Warrant of Lands Titles Commissioners.

Whereas A. B., of-----hath, by application No. -----, dated the-----day of-----, requested that the lands therein described be brought under the operation of the Real Property Act, and the said application has been referred to us by the Registrar-General, we hereby direct that publication of same be made in the following manner, that is to say (or we find no sufficient grounds to entitle him to be recognized as holding fee-simple estate in the said lands), and in case no caveat be received by the Registrar-General in respect to such lands on or before the-----day of----- we direct the Registrar-General to take such steps as are by law directed for bringing such land under the operation of the said Act.

R. S.,
L. M.,

Lands Titles Commissioners.

Dated this-----day of-----, 185---

SCHEDULE L.

Caveat.

Take notice that I, -----, claiming estate or interest (here state the nature of the estate or interest claimed and the grounds on which such claim is founded) in lands described as (here state particulars of description from declaration of Applicant) in notice dated the-----day of----- advertising the same as land in respect to which claim has been made, to have the same brought under the operation of Act of Council No.-----, of 18---, intituled the Real Property Act, do hereby forbid the bringing of the said lands under the operation of the said Act.

This-----day of-----.

Signed in my presence this-----day of-----
at-----.

To the Registrar-General of the Province of South Australia.

SCHEDULE M.

Notice of Lands Brought Under Act.

Whereas A. B., of-----, claiming to be seised of an estate, in the lands described at foot hereof, has applied to have the said lands brought under the operation of the Real Property Act, and such claim having been duly advertised in manner prescribed by the said Act, and no caveat in respect to the said lands having been received by me within the time for

ORIGINAL TORRENS ACT

that purpose by the said Act limited; Now I, _____, of _____, Registrar-General by virtue of powers by the said Act in me vested, do hereby declare the said lands to be lands brought under the operation of the said Act, from and after the date hereof.

Given under my hand the _____ day of _____, 185__.

Registrar-General.

SCHEDULE N.

Declaration of Owner Taking by Transmission.

I, _____, of _____, declare that _____, the proprietor of (here describe the property and state the nature of the estate or interest transmitted) (died at _____, in the _____, having first duly made his will, dated the _____ day of _____, whereby he appointed me executor, and I proved his said will on the _____ day of _____, in the Court of _____), or (died at _____, in the _____, on the _____ day of _____, intestate, and that letters of administration of his estate and effects were on the _____ day of _____ duly granted to me by the Court of _____; or we declare that C. D. the proprietor of (here describe the property and state the nature of the estate or interest transmitted) was on the _____ day of _____ (duly adjudged a bankrupt), or (declared insolvent), and that we were on the _____ day of _____ appointed assignees of the said C. D., and we are by law entitled to be registered as proprietors of the said land (or of his interest therein as above described) or (I declare that on the _____ day of _____ I intermarried with and am now the husband of C. D., the proprietor of (here describe property and estate or interest therein transmitted), and I declare that on such marriage the interest of the said C. D. became by law vested in me, and that I am entitled to be registered as proprietor of the said land or of her interest in the said land. And I make this solemn declaration conscientiously, believing the same to be true.

(Signed)

Dated at _____, the _____ day of _____, 18__.

Made and subscribed by the above-named A. B., in the presence of me.

(Signed)

(Name of the Registrar or Justice of the Peace acting in and for _____.)

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SCHEDULE O.

Transfer of Mortgage, Lease, or Encumbrance to Be On or Endorsed on Original Mortgage, Bill of Encumbrance, or Lease.

I, the within-mentioned C. D., in consideration of £-----, this day paid to me by X. Y., of-----, the receipt of which sum I do hereby acknowledge, hereby transfer to him the estate or interest in respect to which I am registered as Proprietor, as set forth and described in the within-written security, together with all my rights, powers, estate, and interest therein.

In witness whereof I have hereunto subscribed my name, this -----day of-----.

(L. S.)

C. D.

Signed by the above-named C. D., in the presence of E. F., the-----day of-----.

SCHEDULE P.

Caveat Forbidding Registration of Contract for Dealing With Estate or Interest in Futuro.

To the Registrar-General of South Australia:

Take notice that I, -----, claiming estate or interest (here state the nature of the estate or interest claimed, and the grounds on which such claim is founded) in (here describe land) forbid the registration of any memorandum of sale, or other instrument, made, signed, or executed by (here insert name and address of person supposed to have made, or suspected of being about to make, such memorandum of sale or other instrument) affecting the said land, until this caveat be by me, or by the order of the Supreme Court, or some Judge thereof, withdrawn.

Dated this (here insert date of caveat) day of-----, 18----

SCHEDULE Q.

SOUTH AUSTRALIA.

Revocation Order.

I, A. B., of-----, being seised of an estate (here state nature of the estate, whether in fee simple or of a less description) in all that piece of land (here describe land) hereby revoke the power of mortgaging (or selling) the said land given by me to-----by a power of attorney dated the -----day of-----.

In witness whereof, I have hereunto subscribed my name and affixed my seal, this-----day of-----.

(L. S.)

A. B. of-----.

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I, M. N., Registrar-General, hereby certify that the above-named proprietor has executed this revocation order in manner above appearing.

(Signed)

Registrar-General.

SCHEDULE R.

Certificate of Registrar-General, Justice of the Peace, Etc., Taking Declaration of Attesting Witness.

Appeared before me, at _____, the _____ day of _____, C. D., of _____, the attesting witness to this instrument, and acknowledged his signature to the same; and did further declare, that A. B., the party executing the same, was personally known to him, the said C. D., and that the signature of this said instrument is the hand-writing of the said A. B.

(Signed)

Registrar-General, or J. P.

SCHEDULE S.

Certificate of Registrar-General, or Justice of the Peace, Before Whom Instrument May Have Been Executed By the Parties Thereto.

Appeared before me, at _____, the _____ day of _____, A. B., of _____, the party executing the within instrument, and did freely and voluntarily sign the same.

(Signed)

Registrar-General, or J. P.

SCHEDULE T.

Fees Payable to the Registrar-General for the Performance of the Several Acts, Matters, and Things Herein Specified.

£. s. d.

For the bringing land under the operation of this Act, to be paid to the Lands Titles Commissioners, as provided for by Sec. No. 11 over and above the cost of all advertisements herein prescribed, to be in such case published	1.	0.	0.
Receipt and noting of Caveat	0.	10.	0.
Registering Memorandum of Sale, Bill of Mortgage, Bill of Trust, or Encumbrance, or Lease	0.	10.	0.
For registering Transfer of Mortgage or of Encumbrance, or Release of Mortgage or Encumbrance, or the Transfer or Surrender of a Lease	0.	5.	0.
Registering Declaration of Ownership taken by Transmission	0.	10.	0.

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For every Certificate of Title-----	1.	0.	0.
For every Power of Attorney-----	0.	15.	0.
For every Registration of Abstract-----	0.	15.	0.
For cancelling Power or Registration Abstract-----	0.	5.	0.
For every Revocation Order-----	0.	10.	0.
Provisional Certificate of Title-----	1.	0.	0.
For every search-----	0.	3.	0.

Including the printed forms for each case prescribed to be used by this Act or by any regulation made in accordance with this Act; 2s. 6d. extra to be charged for any such instrument drawn on parchment.

COPY OF TITLE INSURANCE POLICY.

CAPITAL, \$5,000,000.

CHICAGO TITLE AND TRUST COMANY,

Of Chicago, Illinois.

No. 131,415.

Amount, \$10,000.00.

This Guarantee Policy Witnesseth, that the Chicago Title and Trust Company, in consideration of the sum of seventy-five dollars, to it in hand paid, doth hereby guarantee Edward Stone, his heirs or devisees, or any person or persons to whom this policy shall be transferred, with the assent of the Company endorsed hereon, against all loss or damage not exceeding ten thousand dollars, which the said party guaranteed shall sustain by reason of defects in the title of the party guaranteed, as set forth in Schedule A, hereunto annexed, to the real estate or interest therein, described in said Schedule A, or by reason of liens or incumbrances affecting the same, at the date hereof, excepting only such liens, incumbrances and other matters as are set forth in Schedule B, hereto annexed, subject to the conditions and stipulations hereto annexed and made a part of this policy.

This policy is issued upon application by or on behalf of the party guaranteed, numbered 131,415, which application shall be held against all parties claiming hereunder to be a warranty of the facts therein stated.

In Witness Whereof, the Chicago Title and Trust Company hath caused its corporate seal to be hereto affixed and these presents to be signed by its President and attested by its Secretary, this first day of May in the year of our Lord one thousand nine hundred and three (1903).

-----President.

Attested:

-----Secretary.

TITLE INSURANCE POLICIES

SCHEDULE A.

1.

The estate or interest of the party guaranteed covered by this policy.

Fee Simple.

2.

Description of the real estate in respect of which this policy is used.

Lot one (1) in Block two (2) in Edward Stone's Addition to Chicago, being a subdivision of the West fractional half of Section one (1), Township thirty-nine (39) North, Range fourteen (14), East of the third Principal Meridian, in Cook County, Illinois.

SCHEDULE B.

Showing estates, or defects in title, and liens, charges and incumbrances thereon, which do or may now exist, and against which the Company does not guarantee.

1. Rights or claims of parties in possession not shown of record and questions of survey.

2. Taxes for the year 1903.

3. Trust deed made by Edward Stone to Richard W. Clark, dated April 1, 1902, and recorded April 3, 1902, as document 4,040,302 in book 4,949, page 13, to secure his note for nine thousand dollars due 10 years after date, with interest at 5 per cent. per annum, payable semi-annually, etc.; conveys premises in question and other property.

4. Judgment rendered April 14, 1902, for \$2,500 and costs, in favor of Silas Cunningham and against Edward Stone in case 29,005 Circuit Court.

5. Mechanic's lien claim No. 2,345, filed June 29, 1902, by Andrew Jackson against Patrick Daley and others; amount \$1,400.

6. Special assessment confirmed July 17, 1902, Warrant 69, for paving, etc., River Street; amount \$450.13, payable in 5 annual installments, the last 4 of which remain unpaid.

CONDITIONS AND STIPULATIONS OF THIS POLICY.

1. THE CHICAGO TITLE AND TRUST COMPANY shall have the right to, and will, at its own cost and charges, defend the party guaranteed in all actions of ejectment or other action or proceeding founded upon a claim of title, incumbrance or defect which existed or is claimed to have existed prior in date to this policy and not excepted herein; reserving, however, the option of settling the claim or paying this policy in full; and the payment or tender of payment to the full amount of this policy shall determine all liability of this company thereunder. In case any such action or proceeding shall be begun, it shall be the duty of the party guaranteed at once to notify the company thereof in writing, and secure to it, when practicable, the right to defend such action or proceeding, and to give all reasonable assistance therein. If such notice shall not be given to the company within

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ten days after summons or other process in such action or proceeding shall be served upon the party guaranteed in person, then all liability of this company in regard to the subject matter of such action or proceeding shall cease and be determined.

2. Whenever the company shall have settled a claim under this policy, it shall be entitled to all rights and remedies which the party guaranteed would have had against any other person or property in respect to such claim, had this policy not been made, and the party guaranteed undertakes to transfer to the company such rights, and to permit it to use the name of the party guaranteed for the recovery thereof. Any sum collected on such rights over and above the amount of loss paid by said company, shall belong and on demand shall be paid to the party guaranteed. The party guaranteed warrants that such rights of subrogation shall vest in the company unaffected by any act of the party guaranteed.

3. Nothing contained in this policy shall be construed as a guarantee against loss or damage by reason of fraud on the part of the party guaranteed; or by reason of claims undisclosed of record arising under any act done or trust relationship created, suffered or permitted by said party; or by reason of the fact that said party was not a purchaser for value, or that said party contravened the laws of the United States establishing a uniform system of bankruptcy in his acquisition of the estate or interest hereby guaranteed; nor against the rights of dower and homestead, if any, of the spouse of the party guaranteed; nor will this company be liable in any event for any loss or damage arising from the refusal of any party to carry out any contract to purchase, lease or loan money on the estate or interest guaranteed.

4. Loss or damage by reason of special taxes, special assessments, water rentals or water taxes, which have not been confirmed by a Court of Record, conveyances or agreements not of record at the date of this policy, or mechanics' liens when no notice thereof appears of record are not covered by it.

5. A statement in writing of any loss or damage for which it is claimed this company is liable shall be furnished to the company within sixty days after such loss or damage, and no right of action shall accrue under this policy until thirty days after such statement shall have been furnished, and no recovery shall be had under this policy unless action shall be commenced thereon within one year after the expiration of said last mentioned period of thirty days; and a failure to furnish such statement of loss or damage, and to commence such action within the times hereinbefore specified, shall be a conclusive bar against the maintenance of any action under this policy.

6. All payments under this policy shall reduce the amount guaranteed *pro tanto*, and no payment can be demanded without producing the policy for endorsement of such payment. If the policy be lost or destroyed, indemnity must be furnished to the satisfaction of the company.

This policy necessarily relates solely to the title prior to and including its date.

Assignments of this policy must be with the assent of the company endorsed hereon, and, to protect subsequent purchasers against intermediate claims or losses, must be continued to date.

Trustees and Mortgagees, to receive the benefit of this policy, should obtain a "mortgagee's policy" hereon.

In assenting to assignments no liability is assumed by the company for defects or incumbrances created subsequent to the date of this policy.

TITLE INSURANCE POLICIES

ASSIGNMENT OF POLICY.

Chicago,-----19----- For Value Received-----hereby
assign all interest in this policy to-----

Assented to-----19-----	}	-----
subject to foregoing conditions.		-----
CHICAGO TITLE AND TRUST		-----
COMPANY,		-----
by-----		-----

There are some twenty variations of this form of policy. One insures a purchaser of real estate against defects in the title of his vendor; one insures in its own title a corporation owning real estate; one insures the trustee in a trust deed, for the use and benefit of the owner of the indebtedness, against defects in the title of the maker or makers of the trust deed; one insures the owner of the indebtedness, described in a certain trust deed, against defects in the title of the maker or makers of the trust deed, and since the name of the owner of the indebtedness is not inserted in the policy, it is good in the hands of any person who may in fact be the owner at any time during the existence of the debt; one insures the mortgagee, his executors, administrators and assigns, against all loss or damage by reason of defects in the title of the mortgagor. Other forms are issued to meet the requirements of non-residents or others who loan money and who may desire insurance against the existence of mechanics' liens or other adverse interests, of which no notice appears of record. Such policies are issued under special agreements, when the funds to be advanced and paid over are deposited with and disbursed by the company. Upon the foreclosure of an incumbrance and the issue of a certificate of sale, the company insures the owner of the certificate against defects in the title, and by its policy guarantees that such owner, in case no redemption is made, will be entitled to a master's deed conveying a fee simple title. The company guarantees estates for life or for years, and leasehold interests in lands. When an incumbrance has been foreclosed and the owner of the debt has obtained a deed for the property, his mortgage policy becomes in effect an owner's policy, bearing its date and amount, and it may be continued to date, and increased in amount, if desired.

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Author

Vol.

Niblack, Wm Caldwell

Title

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An analysis of the Torrens
system of conveying land.

Date

Borrower's Name

